CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

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U.S. Customs Service

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and

U.S. Court of International Trade

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 19, 2000.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER & TREATMENT RELATING TO TARIFF CLASSIFICATION OF A HANDBAG

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter and treatment relating to the classification of a handbag.

SUMMARY: Pursuant to Section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a handbag with an outer surface of textile material. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before March 3, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Ruling Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Mary Beth Goodman, Textile Branch, (202) 927-1368.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the classification of a handbag from India. Although in this notice Customs is specifically referring to one ruling, Port Decision (PD) C81765, this notice covers any rulings on this merchandise, which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice and comment period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

In PD C81765, dated December 2, 1997, concerning the tariff classification of a handbag of textile materials with an outer surface of textile materials of man-made fibers, the product was erroneously classified under subheading 4202.22.4030 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) as a handbag of textile materials with an outer surface of textile materials made wholly or in part of braid. The item under review is not described as having any braided features and therefore tariff number 4202.22.4030 is inappropriate. PD C81765 is set forth as "Attachment A" to this document. The correct classification for the product should be under subheading 4202.22.8050 of the HTSUSA as a handbag "with an outer surface of textile material, other, other, other, of man-made fibers."

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke PD C81765, and any other ruling not specifically identified on identical or substantially similar merchandise to reflect the proper classification within the HTSUSA pursuant to the analysis set forth in Proposed Headquarter Ruling (HQ) 961239 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: January 13, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 2, 1997.

CLA-2-42:G32 C81765
Category: Classification
Tariff No. 4202.22.4030

MS. JOANNE BALICE
CBI DISTRIBUTING CORP.
2400 W. Central Road
Hoffman Estates, IL 60195–1930

Re: The tariff classification of a Handbag from India.

MS. BALICE:

In your letter dated November 10, 1997, you requested a tariff classification ruling.

The merchandise you requested a ruling on is a Handbag, Style No. 37707-7. The handbag is made of man-made fibers and measures approximately 6 inches x 8 inches. One side of the bag is decorated with eleven (11) embroidered flowers, measuring approximately ½ inch x 1 inch. Inserted in the middle of the flower is a round reflective disk. The bag has a zippered closure and a narrow textile shoulder strap.

Please be advised that your sample will be mailed to the above address.

The applicable subheading for the Handbag will be 4202.22.4030, Harmonized Tariff Schedule of the United States (HTS), which provides for handbags with an outer surface of textile materials, other. The rate of duty will be 8.1 percent ad valorem.

Items classifiable under 4202.22.4030 fall within textile category designation 670. Based upon international textile trade agreements, products of India are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

WILLIAM J. LUEBKERT,
Port Director,
Philadelphia.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 961239 MBG
Category: Classification
Tariff No. 4202.22.8050

MS. JOANNE BALICE
CBI DISTRIBUTING CORP.
2400 W. Central Road
Hoffman Estates, IL 60195–1930

Re: Tariff classification of a handbag from India; Revocation of Ruling PD C81765.

DEAR MR. BALICE:

On December 2, 1997, Customs issued PD C81765 to your company, regarding the tariff classification of a handbag from India. The handbag was originally classified under subheading 4202.22.4030 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon review, Customs has determined that the handbag was erroneously classified under subheading 4202.22.4030, HTSUSA, as a handbag with an outer surface of man-made fiber textile materials and containing braid. The Office of Regulations & Rulings has been advised by our New York office that the item under consideration did not contain any braiding and for that reason we are amending the previous ruling. The correct classification for the product should be under subheading 4202.22.8050, HTSUSA, based on classification as a handbag with an outer surface of textile material not containing any braid.

Facts:

The item under review is a handbag, style #37707–7 made of textile materials with an outer surface of textile materials, of man-made fibers, not containing any braid. The merchandise measures approximately 6 inches x 8 inches in size. One side of the bag is decorated with eleven (11) embroidered flowers, measuring approximately ½ inch x 1 inch. Inserted in the middle of each flower is a round reflective disk. The bag has a zippered closure and a narrow textile shoulder strap.

Issue:

Whether the handbag is classifiable under subheading 4202.22.8050, HTSUSA, rather than in subheading 4202.22.4030, HTSUSA?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs. Subheading 4202.22 covers "Handbags, whether or not with shoulder strap, including those without handle: with outer surface of sheeting of plastic or of textile materials * * *."

When this product was originally reviewed by Customs an error occurred during classification at the eight digit subheading level. For tariff purposes, a handbag composed of an outer surface of textile materials, wholly or in part of braid falls into the eight digit subheading of 4202.22.4030, HTSUSA. Since the item under review does not contain braiding, the appropriate eight digit subheading level should be 4202.22.8050, HTSUSA. Subheading 4202.22.8050, provides for "Handbags * * * with an outer surface of textile materials, other, other, other, of man-made fibers." Since the handbag is *eo nomine* provided for by subheading 4202.22.8050, it is classifiable under that tariff provision.

Holding:

This ruling revokes PD C81765 and classifies the handbag under subheading 4202.22.8050, HTSUSA, which provides for "Handbags * * * with an outer surface of textile materials, other, other, other, of man-made fibers" with a general column one duty rate of 18.6 percent ad valorem and falling within textile category 670.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF BAGS NOT DESIGNED FOR PROLONGED USE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of and treatment relating to tariff classification of plastic bags.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of plastic bags, to revoke any treatment previously accorded by Customs to substantially identical merchandise, and to consider the thickness of plastic sheeting as a factor in the classification of bags, sacks, or pouches composed of clear, unembossed, polyvinyl chloride (PVC) plastic sheeting, of a kind both sold at retail on their own merits and sold at retail as packaging with specific contents. Customs will consider the fact that the plastic sheeting which comprises such articles measures less than 4 mils in thickness, to be generally indicative of a bag that is not designed for prolonged use. Notice of the proposed modification was published in the CUSTOMS BULLETIN of December 8, 1999, Vol. 33, No. 49. One comment was received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 3, 2000.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textile Branch (202) 927-2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that, in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In NY D80975, issued September 9, 1998, four containers identified as display bags were classified in subheading 4202.92.4500, HTSUSA, the provision for "Trunks * * * traveling bags, toiletry bags * * * and similar containers * * *: Other: With outer surface of sheeting of plastic or of textile materials: Travel, sports and similar bags: Other." Due to the presence of certain features on one of the four bags (hereinafter identified as item number one), it is now Customs position that this article is not designed for prolonged use as a traveling bag or toiletry bag that is classifiable under heading 4202, HTSUSA.

Sample item number one consists of a bag or pouch which resembles an envelope. The bag is essentially composed of clear, unembossed, PVC plastic sheeting. The item measures approximately 12 inches in width by 6½ inches in height, and the plastic sheeting material measures approximately 9.5 thousandths of an inch (9.5 mils) in thickness. Item number one has a flap with a metal snap closure. The article also has a top center cutout (which measures approximately 2 inches in length by ¼ inch in width) through which a flimsy plastic hanger protrudes. A paperboard card which advertises the "Wonderbra® convertible backless bra" is included in the envelope (as an indication of contents to be added after importation).

The thickness of the bag's clear, unembossed, PVC plastic sheeting measures 4 mils or more in thickness, which Customs has considered in the case of garment bags to be generally indicative of a construction that is designed for prolonged use. The presence of the container's top center cutout and plastic hanger, however, indicates that item number one is a container that is designed to hold and display goods that are hung on a rack for sale at retail. A clear, unembossed, PVC plastic container which features such a cutout and includes a flimsy plastic hanger is not of a kind normally sold at retail on its own merits. Considering all of the above, it is therefore Customs position that item number one is not designed for prolonged use (i.e., for use after the original contents with which it is sold at retail have been removed for consumption). The article is properly classified in subheading 3923.29.0000, HTSUSA, the provision for "Articles for the conveyance or packing of goods, of plastics * * *: Sacks and bags (including cones): Of other plastics."

Pursuant to 19 U.S.C. § 1625(c)(1), Customs is modifying NY D80975, and any other ruling not specifically identified which involves identical or substantially identical merchandise, to reflect the proper classification of item number one according to the analysis in Headquarters Ruling Letter (HQ) 962363, set forth as "Attachment" to this document. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), Customs is revoking any treatment that Customs may have previously accorded to substantially identical merchandise.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the im-

porter or its agents for importations subsequent to the effective date of this final decision.

Dated: January 19, 2000.

JOANNE ROMAN STUMP,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 19, 2000.
CLA-2 RR:CR:TE 962363 GGD
Category: Classification
Tariff No. 3923.29.0000 and 4202.92.4500

JASON M. WAITE, ESQUIRE
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN, LLP
303 Peachtree Street, N.E.
Atlanta, GA 30308

Re: Modification of NY D80975; "Display Bags;" Clear, Unembossed, PVC Retail Packaging Less than 4 Mils Thick Not Designed for Prolonged Use; Odd Shapes, Cutouts, Hangers, Tabs, Indicative of Single Use; Bags of Kind Normally Sold on Own Merits at Retail as Traveling/Toiletry Bags and of Kind Normally Sold as Retail Packaging with Contents.

DEAR MR. WAITE:

In New York Ruling Letter (NY) D80975, issued September 9, 1998, to Southern Overseas on behalf of The Murphy Group, Inc., Customs classified four articles described as "display bags" in subheading 4202.92.4500, HTSUSA, the provision for "Trunks * * * traveling bags, toiletry bags * * * and similar containers * * *: Other: With outer surface of sheeting of plastic or of textile materials: Travel, sports and similar bags: Other." You subsequently requested reconsideration of the ruling. We have reviewed NY D80975 and, with respect to one of the bags, have found it to be in error. Therefore, this ruling modifies NY D80975.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of NY D80975 was published on December 8, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 46.

Facts:

In your letter dated November 12, 1998, requesting reconsideration of NY D80975, you take issue with Customs classification of two of the four bags (hereinafter identified as item numbers one and four), conceding that the other two bags are properly classified in subheading 4202.92.4500, HTSUSA. The two bags at issue are imported without contents and are claimed to be ordinary vinyl packaging materials that are included (at no cost) with the purchase of the article or articles they eventually will contain when sold at retail.

Sample item number one is a bag or pouch which resembles an envelope. The bag is essentially composed of clear, unembossed, polyvinyl chloride (PVC) plastic sheeting. The item measures approximately 12 inches in width by 6½ inches in height, and the plastic sheeting material measures approximately 9.5 thousandths of an inch (9.5 mils) in thickness. Item number one features a flap with a metal snap closure. The article also has a top center cutout (which measures approximately 2 inches in length by ¼ inch in width) through which a flimsy plastic hanger protrudes. A paperboard card which advertises the

"Wonderbra® convertible backless bra" is included in the envelope (as an indication of the merchandise to be added after importation).

Sample item number four is a cylindrically-shaped, drawstring utility bag that is essentially composed of clear, unembossed, PVC plastic sheeting. The item resembles a small duffel bag and measures approximately 7¼ inches in height by 3 inches in diameter. The plastic sheeting material measures approximately 7.2 mils in thickness. Item number four features a top that may be drawn closed by means of a braided cord which passes through eight eyelets. A stitched side seam extends the full height of the bag and the bag's top and bottom have stitched PVC edging.

Issue:

Whether the articles are classified under heading 4202, HTSUSA, which covers, in part, traveling bags, toiletry bags, and similar containers; or under heading 3923, HTSUSA, as articles for the conveyance or packing of goods, of plastics.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Among other merchandise, chapter 42, HTSUSA, covers travel goods, handbags and similar containers. Among other items, heading 4202 provides for "* * * traveling bags, toiletry bags * * * and similar containers." The exemplars named in heading 4202 have in common the purpose of organizing, storing, protecting, and carrying various items. In pertinent part, legal note 2(A)(a) to chapter 42, HTSUSA, states:

> * * * heading 4202 does not cover:
>
> Bags made of sheeting of plastics, whether or not printed, with handles, **not designed for prolonged use** (heading 3923) (Emphasis added.)

Chapter 39, HTSUSA, covers plastics and articles thereof. In pertinent part, note 2(ij) to chapter 39, HTSUSA, states that "[t]his chapter does not cover * * * trunks, suitcases, handbags or other containers of heading 4202." Among other merchandise, heading 3923, HTSUSA, covers "Articles for the conveyance or packing of goods, of plastics * * *." The EN to heading 3923 indicate that the heading covers all articles of plastics commonly used for the packing or conveyance of all kinds of products, including sacks and bags. The EN also state that the heading excludes containers of heading 4202.

You essentially contend that, because item numbers one and four are designed, intended, and likely to be used principally as retail packaging for unique products, they are not designed for prolonged use and are excluded from classification under heading 4202, HTSUSA. You cite to several Headquarters Ruling Letters (HQ), including HQ 960009 and HQ 959679, both of which concern the issue of whether certain containers composed of PVC plastic sheeting are designed for prolonged use. Although intended use is mentioned in each of the cited rulings, you suggest that Customs has based these and other classification determinations upon whether plastic bags that are capable of reuse are **intended** to be reused. We do not agree.

Customs is often presented with other subjective criteria to consider, and may weigh the uncertain relevance of whether a bag's seams are heat-sealed or sewn; whether eyelet holes are reinforced with metal or heat-sealed grommets; whether a bag has drawstring, snap, or zipper closures; or features handles, piping, printing, opaque sides; etc. While viewing certain features such as hangers, hanger holes or cutouts, plastic tabs with holes for hanging display, cutouts permitting pre-purchase handling of contents, odd/awkward shapes, etc., as indications that retail packaging bags are not designed for prolonged use, Customs has found that determinations as to whether such plastic bags are "not designed for prolonged use" are properly based upon whether or not a bag: 1) is of a kind normally sold at retail on its own merits as a traveling or toiletry bag; and 2) is of a kind normally sold at retail as packaging with contents.

These were the significant factors in HQ 960009, issued October 16, 1997, in which this office classified several bags under heading 4202, finding that "* * * the bags are not of a

kind normally used in the packaging of toiletries/cosmetics and are of a kind sold at retail on their own merits as travel or toiletry bags." We looked to the same determining factors in HQ 959679, issued May 8, 1997, and found that "[t]he bag is of a kind sold at retail on its own merits * * *. It is similar to PVC travel bags either sold on their own or with other personal effects, cosmetics or toiletries. It is not of a disposable kind normally used to temporarily hold its contents."

In order to more objectively distinguish bags of clear, unembossed, PVC plastic sheeting that are not designed for prolonged use from those that are, Customs will additionally consider the thickness of a bag's plastic sheeting as a factor in the classification of bags of a kind both sold on their own merits and sold as packaging. Customs has long classified under heading 4202, garment bags composed of **embossed** vinyl or PVC plastic sheeting which measures four mils or more in thickness, finding that such thickness usually denotes a durably constructed article that is designed for prolonged use and travel. Customs has also determined that garment bags composed of embossed vinyl or PVC plastic sheeting which measures less than four mils in thickness are generally less durable and not designed for prolonged use. Those bags have been classified under headings 3923 and 3924, HTSUSA. See HQ 962225, issued May 21, 1999, HQ 961092, issued March 24, 1998, HQ 960411, issued October 7, 1997, HQ 955470, issued February 17, 1994, and HQ 082463, issued September 25, 1989. Since embossed vinyl and PVC garment bags are not normally used to **display** articles sold at retail, Customs does not generally consider the features indicating that clear PVC bags are not designed for prolonged use (hangers, hanger holes, cutouts, etc.) to be applicable to garment bags.

Although the Customs laboratory has concluded that the formula recommended by the American Society for Testing and Materials (ASTM) D 1593, "Specification for Nonrigid Vinyl Chloride Plastic Sheeting," must be used to determine the thickness of **embossed** plastic sheeting, the laboratory has further advised that for routine testing (e.g., determining the thickness of **unembossed** PVC plastic sheeting), standard dead weight methods may be used. See ASTM D 1593 "Test Methods" section 10.1.3.

Therefore, to determine the classification of bags, sacks, or pouches that are composed of clear, unembossed, PVC plastic sheeting, Customs will consider plastic sheeting which measures less than 4 mils in thickness to be generally indicative of an article that is not designed for prolonged use. Customs will also consider plastic sheeting which measures 4 mils or greater in thickness to be generally indicative of a container that is designed for prolonged use to carry personal effects (UNLESS the container is not of a kind normally sold at retail on its own merits; and ABSENT single use indicators such as hangers, cutouts, tabs, odd shapes, etc. noted above).

In this case, despite the fact that the PVC plastic sheeting of item number one measures 9.5 mils in thickness, the presence of the top center cutout and flimsy plastic hanger indicates that the bag is a container for goods that will be displayed on a rack for sale at retail. Although the thickness of the plastic sheeting indicates durability, the package is designed to withstand any number and variety of pre-sale manipulations by shoppers, and not for prolonged use after sale. If imported separately, we would consider the plastic hanger itself to be an article for the conveyance or packing of goods. In this case, the hanger is designed to suspend the bag with which it is imported and help to display a product. The hanger and bag components would not normally be offered for sale in separate parts. Together they comprise a composite article, the essential character of which is imparted by the bag component. The complete "display bag" is not of a kind normally sold at retail on its own merits, but is of a kind that is sold at retail with specific contents. Item number one is not designed for prolonged use (after its original contents have been removed for consumption), and it is therefore excluded from heading 4202 by note 2A(a) to chapter 42, HTSUSA. Item number one is properly classified in subheading 3923.29.0000, HTSUSA.

Although item number four may be intended merely for use as unique retail packaging to favorably present a product, enhance the likelihood of its sale, and carry it from store to home, the bag is of a kind normally sold at retail on its own merits as a traveling or toiletry bag. The item is not of a kind normally sold at retail as packaging with its contents and it is substantially constructed of plastic sheeting which measures 7.2 mils in thickness. Unlike item number one, this bag has no cutout, hanger, or other feature which would indicate that the bag is not designed for prolonged use. We find that item number four is similar to the containers of heading 4202, HTSUSA, and that it is classifiable thereunder. The article is thus precluded from classification under heading 3923 by note 2(ij) to chapter 39, HTSUSA. Item number four is classified in subheading 4202.92.4500, HTSUSA.

Holding:

The "display bag" identified as item number one is classified in subheading 3923.29.0000, HTSUSA, the provision for "Articles for the conveyance or packing of goods, of plastics * * *: Sacks and bags (including cones): Of other plastics." The general column one duty rate is 3 percent ad valorem.

The "display bag" identified as item number four is classified in subheading 4202.92.4500, HTSUSA, the provision for "Trunks * * * traveling bags, toiletry bags * * * and similar containers * * *: Other: With outer surface of sheeting of plastic or of textile materials: Travel, sports and similar bags: Other." The general column one duty rate is 20 percent ad valorem.

NY D80975, issued September 9, 1998, is hereby modified with respect to the classification of item number one. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOANNE ROMAN STUMP,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TITANIUM BRIQUETTES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to the classification of titanium briquettes.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling, and any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of titanium briquettes, under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on December 8, 1999, in the CUSTOMS BULLETIN, Volume 33, No. 49. No comments were received in response to the notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 3, 2000.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended,

and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, by notice published in Volume 33, Number 49 of the CUSTOMS BULLETIN, on December 8, 1999, Customs stated its intention to revoke a ruling letter pertaining to the tariff classification of titanium briquettes. Although in this notice Customs is specifically referring to New York Ruling Letter (NY) C82798, dated January 5, 1998, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY C82798, Customs ruled that titanium briquettes were classified in subheading 8108.90.3060, HTSUS, as other articles of titanium. After review and consideration of heading 8108, HTSUS, and its subheadings, we are of the opinion that titanium briquettes are classified as

unwrought titanium of subheading 8108.10.5090, HTSUS, rather than as articles of titanium.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY C82798, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 962572 (*see* the Attachment to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: January 14, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 14, 2000.

CLA-2 RR:CR:GC 962572 MGM
Category: Classification
Tariff No. 8108.10.5090

MR. JAMES F. MORGAN
F.W. MYERS & CO., INC.
2600 Cabover Drive, Suite A
Hanover, MD 21076

Re: Titanium Tablets and Briklets; Revocation of NY C82798.

DEAR MR. MORGAN:

This office has recently become aware of conflicting ruling letters issued by Customs National Commodity Specialist Division, New York, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of titanium tablets and briklets. New York Ruling Letter (NY) A89686, dated January 13, 1997, to SKW Metals and Alloys, Inc., classified such merchandise in subheading 8108.10.5090, HTSUS, as unwrought titanium. However NY C82798, issued to you on January 5, 1998, on behalf of SKW Metals and Alloys, Inc., classified identical merchandise in subheading 8108.90.3060, HTSUS, as other articles of titanium.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation was published on December 8, 1998, in Volume 33, Number 49 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Facts:

The merchandise consists of titanium tablets and briklets. The titanium tablets are formed by pressing together grains of 98% or greater titanium, 1–2% aluminum and a small amount of flux (a substance which promotes the fusing of metals) into tablets or briquettes

approximately 3.5 in. (90 mm) in diameter and 1.1 in. (29 mm) in height. The tablets weigh one pound each. The titanium briklets are formed in a similar manner, however they have one-fourth the mass of the tablets. Both the tablets and briklets are used for adding a known quantity of titanium to an iron or steel melt.

Customs Laboratory Reports (2–97–20405–001, dated Dec. 30, 1996; 2–97–20404–001, dated Dec. 30, 1996), prepared in conjunction with NY A89686, describe the tablets and briklets as "a metal tablet approximately 3-1/2 inches in diameter is composed essentially of unwrought titanium grains compacted together," and "a small metal briquette approximately 1-5/8 inches in diameter, is composed essentially of unwrought titanium grains compacted together," respectively.

Issue:

Are the titanium tablets and briklets "unwrought" titanium?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

Both NY A89686 and NY C82798 classified the titanium tablets and briklets in heading 8108, HTSUS. This heading provides as follows (ten-digit statistical breakouts omitted):

8108	Titanium and articles thereof, including waste and scrap:
8108.10	Unwrought titanium; waste and scrap; powders:
8108.10.10	Waste and scrap
8108.10.50	Other:
8108.90	Other:
8108.90.30	Articles of titanium
8108.90.60	Other

NY A89686 classified the titanium tablets and briklets under the provision for unwrought titanium, while NY C82798 classified the merchandise as "other" than unwrought titanium. The term "unwrought" is defined in the tariff as "metal, whether or not refined, in the form of ingots, blocks, lumps, billets, cakes, slabs, pigs, cathodes, anodes, briquettes, cubes, sticks, grains, sponge, pellets, flattened pellets, rounds, rondelles, shot and similar manufactured primary forms * * *." *See* Additional U.S. Note 1, Section XV, HTSUS. This Note has been interpreted by the Court of International Trade to refer to "forms that have undergone some processing but must undergo further processing before they appear in an eventual final product." *Anval Nyby Powder AB, v. U.S.*, 20 CIT 608, 616, 927 F.Supp 463 (1996). In *Anval Nyby,* the court held that cobalt alloy powder was "unwrought" as it undergoes further processing before it appears in a final product. *Anval Nyby* 20 CIT at 616–7. Similarly, the titanium tablets and briklets are not end products in themselves but rather are intended to be added to a solution of metals and then fabricated into an end product.

One might argue that the instant case differs from *Anval Nyby* as that case involved simple metal alloy powder while the instant merchandise is pressed grains of metal and that this additional step, pressing into tablet or briklet form, makes the instant merchandise more than "unwrought." However, both the terms "cakes" and "briquettes" are listed as examplars of "unwrought" primary forms. "Briquettes * * * are made of compressed powders," *Anval Nyby* 20 CIT at 615, while "cake" is defined as "a block of compacted or congealed matter," *Webster's Ninth New Collegiate Dictionary.* Thus, in the same manner that

"cakes" and "briquettes" are included within the list of "unwrought" forms, the titanium tablets and briklets are classified as "unwrought" metal despite having been pressed into solid form.

Holding:

Titanium tablets and briklets are classified in subheading 8108.10.5090, HTSUS.

NY C82798 is revoked. NY A89686 is affirmed. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 99–129)

AIMCOR, ALABAMA SILICON, INC., AND AMERICAN ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–06–00322

(Dated December 10, 1999)

Baker & Botts, L.L.P. (William D. Kramer and *Clifford E. Stevens, Jr.*, Esqs.) for plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(A. David Lafer,* Senior Trial Counsel, and *James H. Holl, III,* Attorney); *Christine Savage,* Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel.

Kaye, Scholer, Fierman, Hays & Handler, LLP (Julie C. Mendoza, Donald B. Cameron, and *Dean C. Garfield,* Esqs.) for defendant-intervenor.

[Defendant-intervenor's motion to dissolve preliminary injunction **DENIED**; plaintiffs' motion for leave to respond to defendant's response is **DENIED**. **FURTHER *ORDERED*** *sua sponte:* due to the rescission of the countervailing duty order by Commerce and the possibility of mootness in this case, further proceedings are stayed pending the final decision in other actions as to whether rescission of the order by Commerce was valid.]

OPINION AND ORDER

INTRODUCTION

WATSON, *Senior Judge:* This is a countervailing duty case involving ferrosilicon imported from Venezuela within the court's jurisdiction under 28 U.S.C. §1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). Pursuant to 19 U.S.C. § 1516a(c)(2), upon the request of an interested party and upon a proper showing, the Court of International Trade may enjoin the liquidation of entries covered by a countervailing duty determination of the United States Department of Commerce ("Commerce). If the court sustains the cause of action, in whole or in part, entries of merchandise covered by a published determination of Commerce the liquidation of which was enjoined in accordance with § 1516a(c)(2), "*shall* be liquidated *in accordance with the final court decision in the action"* 19 U.S.C. § 1516a(e)(2) *(emphasis added).*

Defendant-intervenor, Ferroatlantica de Venezuela, S.A. ("Ferroven")(formerly CVG-Venezolana de Ferrosilicio, C.A. ("FELSILVEN")), the sole Venezuelan producer and exporter of ferrosilicon to the United States, moves to dissolve the court's May 29, 1996 preliminary injunction enjoining, during the pendency of this litigation, the liquidation of certain entries of ferrosilicon from Venezuela covered by a countervailing duty order. As grounds for dissolution, defendant-intervenor alleges that due to changed circumstances maintenance of the injunction would be inequitable and dissolution is in accord with the terms of the injunction order relating to revocation. Defendant concurs with the reasons advanced by defendant-intervenor for dissolution of the injunction.

Plaintiffs, AIMCOR Alabama Silicon, Inc. and American Alloys, Inc., domestic producers of ferrosilicon, vigorously oppose dissolution because liquidation of the entries prior to a final decision in this case would be contrary to § 1516a(e), contrary to the terms of the injunction itself, and in any event, maintenance of the injunction would not be inequitable, as claimed by defendant-intervenor.

The issue presented is whether, under relevant statutory provisions, and the facts and circumstances of this case, the court should exercise its discretion to dissolve the preliminary injunction prior to a final decision on the merits. For the reasons set forth below, the motion to dissolve is denied.

BACKGROUND

After Commerce published its final affirmative countervailing duty determination covering ferrosilicon from Venezuela, *see Final Affirmative Countervailing Duty Determination: Ferrosilicon From Venezuela; and Countervailing Duty Order for Certain Ferrosilicon From Venezuela*, 58 Fed. Reg. 27,539, 27,542 (May 10, 1993),[1] plaintiffs commenced this action and moved for judgment on the agency record pursuant to USCIT R. 56.2 contesting certain parts of Commerce's determination. Specifically, plaintiffs challenge Commerce's finding that the purchase by the Venezuelan government's holding company of a newly issued class of common stock, Class "E" shares, from the exporter, C.V.G. Venezolana de Ferrosilicio, C.A. ("FILSILVEN"), was consistent with commercial considerations, and therefore, was not countervailable.[2] *Id.* at 27,542. On December 13, 1994, Chief Judge DiCarlo affirmed Commerce's final determination in part, and remanded in part, with directions for further consideration and findings on the issue of whether the Class "E" stock purchase was inconsistent with commercial considerations based on the adequacy of expected return. (Remand I). *See Aimcor, Alabama Silicon, Inc. v. United States,* 871 F. Supp. 447, 454 (CIT

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[1] Commerce amended the countervailing duty order to cover both dutiable and nondutiable ferrosilicon from Venezuela. *See Amendment to Countervailing Duty Order: Ferrosilicon From Venezuela,* 58 Fed. Reg. 36,394 (Dept. of Commerce July 7, 1993).

[2] Ferroven purchased the assets of FELSILVEN, and on January 26, 1999 the court ordered that Ferroven be substituted as defendant-intervenor for FELSILVEN.

1994). *See also* U.S.C. § 1677(5)(A)(ii)(I)("provision of capital * * * on terms inconsistent with commercial considerations").

In Remand I, Commerce again found that Venezuela's purchase of FELSILVEN's Class "E" stock was consistent with commercial considerations, and hence, was not a countervailable subsidy. *Final Results of [First] Remand Determination Pursuant to Court Remand (March 30, 1995)* ("Remand determination I"). Plaintiffs challenged that redetermination.

On December 29, 1995, Chief Judge DiCarlo held that Commerce's findings that Class "E" shareholders would not be deprived of capital gains due to any resale restrictions or conditions, and that the shares are entitled to receive dividends and liquidation distributions are unsupported by substantial evidence on the record. Accordingly, the court held that Commerce's determination that the Venezuelan government's purchase of the Class "E" shares in 1991 was consistent with commercial considerations was unsupported by substantial evidence on the record and remanded to Commerce "to determine the appropriate countervailing duty" for Venezuela's equity infusion into FELSILVEN IN 1991("Remand II"). *Aimcor v. United States,* 912 F. Supp, 549, 555 (CIT 1995). *See also*, 20 CIT 94 (January 4, 1996). In an unpublished order dated April 9, 1996, Judge DiCarlo further directed Commerce to use the standard grant methodology for calculating the countervailing duty rate for the equity infusion FELSILVEN received in 1991.

On Remand II, in accordance with the court's direction, *supra*, Commerce determined the total countervailing duty rate to be 43.10 percent ad valorem for FELSILVEN.(which included a countervailable subsidy rate of 21.02 percent *ad valorem* duty rate for the 1991 equity infusion). *Results of [Second] Redetermination Pursuant to Court Remand* (April 17, 1996).

On April 30, 1996, plaintiffs, sought pursuant to 19 U.S.C. § 1516a(c)(2) to protect itself against the effects of perceived subsidization of the ferrosilicon exporter by the government of Venezuela by enjoining, pending the final decision in this case, the liquidation of the entries of ferrosilicon covered by the countervailing duty order. On May 29, 1996, Judge DiCarlo granted plaintiffs a preliminary injunction "enjoin[ing] [Commerce] during the pendency of this litigation from the liquidation of entries that were entered, or withdrawn from warehouse, for consumption on or after January 1, 1995, and are covered by the countervailing duty order covering ferrosilicon from Venezuela . The injunction has been continuously in effect, and the liquidation of entries has been enjoined, since the date of issuance.

On December 31, 1996, Senior Judge DiCarlo sustained Commerce's Second Redetermination on Remand II calculating the countervailing duty rate. *Aimcor v. United States,* 960 F. Supp. 305 (CIT 1996), *aff'd-in-part, rev'd-in-part, and remanded,* 154 F.3d 1375 (Fed. Cir. 1998). *See also, 957* F. Supp. 289, 291 (CIT 1997). Defendant-intervenor, FELSIL-

VEN, thereupon appealed the final decision of December 31, 1996 to the Federal Circuit.

On September 9, 1998, the Federal Circuit affirmed-in-part and reversed Senior Judge DiCarlo's reversal of Commerce's determination that owners of Class "E" stock could enjoy capital appreciation. The Federal Circuit remanded to Judge DiCarlo the issue of whether an expected return based on potential capital appreciation of the shares alone was sufficient to make the purchase of Class "E" shares by the government of Venezuela consistent with commercial considerations (and hence not a countervailable subsidy). *Aimcor, Alabama Silicon, Inc. v. United States*, 154 F. 3d 1375, 1378–80 (Fed. Cir. 1998). Thereupon, on December 30, 1998, Judge DiCarlo again remanded the Class "E" stock purchase issue to Commerce ("Remand III").[3]

On June 3, 1999, Commerce issued its final results of redetermination in Remand III again determining that the Venezuelan government's purchase of Class E shares was consistent with commercial considerations, and therefore, not a countervailable subsidy. *Final Results of [Third] Redetermination Pursuant to Court Remand (June 3, 1999).*

On July 15, 1999, plaintiffs filed their comments with this court challenging the final results of Remand III, the court has extended the time for defendant's and defendant-intervenor's rebuttal responses to plaintiffs' comments until December 14, 1999, and on October 14, 1999, Ferroven filed its motion to dissolve the preliminary injunction.

After six years of litigation at both the trial and appellate levels, including three remands to Commerce, and during the pendency of this case, the ITC (which had previously made an affirmative injury determination in 1993, *see* USITC Pub. 2650 (1993)), received and considered a request to review its affirmative determination in light of "changed circumstances." ITC determined that certain of the alleged changed circumstances were sufficient to warrant review investigations. On July 28, 1998, the Commission initiated changed circumstances reviews with respect to the antidumping duty and countervailing duty orders covering imports of ferrosilicon from countries, including Venezuela. 63 Fed. Reg. 40,314 (July 28, 1998).

However, on May 21, 1999, the Commission suspended those changed circumstances reviews, and on *reconsideration* of its *original determinations* reversed its previous affirmative injury determinations *ab initio,* and issued a negative determination. *See USITC Pub. 3218 (August 24, 1999).* Based on the Commission's action, Commerce thereupon "rescinded" both its antidumping duty order concerning ferrosilicon from Venezuela, Brazil, Kazakhstan, People's Republic of China, Russia, and Ukraine, and its countervailing duty order concerning ferrosilicon from Venezuela, which is, in part, *sub judice* in the instant case. *See* "Notice of Rescission," *64 Fed. Reg. 51,097, 51,098 (Department of Commerce , September 21, 1999).*

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[3] Following the death of Senior Judge DiCarlo, by order of July 9, 1999 this action was reassigned to the writer.

Rescission of the countervailing duty order was effective *ab initio*—from the date of the issuance of the original order—thus making the order inapplicable to all unliquidated entries of ferrosilicon from the relevant countries covered by the order. *Id.* The court is advised that Commerce is now in the process of issuing liquidation instructions to the Customs Service for all relevant countries *other than Venezuela*, and so advised Customs on August 24, 1999. With respect to unliquidated entries of ferrosilicon from Venezuela that are the subject of the court ordered injunction, the Government continues to comply with the injunction.

A number of suits have been commenced contesting the validity of ITC's negative injury determination on reconsideration and the validity of Commerce's "rescission" of the countervailing duty order.[4]

PARTIES' CONTENTIONS

Ferroven and defendant advance the following grounds for dissolution: (1) ITC has made a negative injury determination after reconsideration of its previous affirmative injury determination; (2) in accordance with ITC's negative injury, Commerce "revoked" the countervailing duty order; (3) since the countervailing duty order was "revoked" by Commerce, under the terms and conditions of the injunction, it must be dissolved and the entries liquidated without assessment of countervailing duties; and (4) courts have inherent authority to dissolve injunctions where the prerequisite factors for issuing an injunction no longer exist (*i.e.*, likelihood of success on the merits and irreparable harm); and (5) due to changed circumstances, maintenance of the injunction would be inequitable, and the court should exercise its discretion to dissolve the injunction.

Plaintiffs oppose dissolution contending: (1) the plain language of the statute, 19 U.S.C. § 1516a(e), requires maintenance of the preliminary injunction so that the entries may "*be liquidated in accordance with the final court decision in the action*" (emphasis added.); (2) admittedly, there has been no final decision in this case on the merits; (3) ITC's negative injury determination and Commerce's rescission of the countervailing duty order are invalid and are currently challenged by plaintiffs (and other parties) in other pending cases; (4) contrary to Ferroven's and defendant's assertions, Commerce did not "revoke" its countervailing duty order, but rather expressly "rescinded" the order; (5) in any event, there is no final court decision in this or any other case "revoking" the countervailing duty order, as required by the express terms of the injunction; (6) therefore, the terms of the injunction itself preclude dissolution; (7) there are no "changed circumstances" that make maintenance of the injunction inequitable or warrant dissolution of the injunction; (8) plaintiffs do not have the burden of again relitigating the prerequisites for injunctive relief in order to avoid a dissolution of the

[4] Court Nos. 99-09-00583, 99-10-00625, 99-10-00628, 99-00-00614, *99-10-00634*, 99-10-00660, 99-10-00662, and 99-10-00657.

injunction; (9) the burden of proof to show that the maintenance of the injunction would be inequitable is on the party moving for dissolution, *viz.*, Ferroven.

DISCUSSION

1.

THE RELEVANT STATUTORY PROVISIONS.

The relevant language of the statute, 19 U.S.C.§ 1516a(e), provides that "[i]f the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—* * * (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall *be liquidated in accordance with the final court decision in the action"* (Emphasis added.). The statutory language is clear, it is undisputed that there has been no final decision in this case, and therefore, under the terms of the statute, liquidations remain enjoined until a final decision. *See Hosiden Corp. v. Advanced Display Mfrs. Of America,* 85 F.3d 589, 591 (Fed. Cir. 1996) ("19 U.S.C. § 1516a(e) requires that liquidation, once enjoined, remains suspended until there is a '*conclusive* court decision which decides the matter, so that subsequent entries can be liquidated in accordance with that conclusive decision'." *Id.* (quoting *Timkin Co. v. United States,* 893 F.2d 337. 342 (Fed. Cir. 1990)) (emphasis by Federal Circuit).

2.

THE TERMS AND CONDITIONS OF THE INJUNCTION.

Ferroven's reliance on the terms and conditions of the injunction itself with reference to "revocation" of the countervailing duty order are misplaced. Thus, the injunction, at 2–3, provides in pertinent part:

> Nothing contained in this Order shall prevent the ultimate liquidation of the subject entries with the assessment of countervailing duties after the final and conclusive Court decision unless a *final decision in this or another action results in the revocation* of the above-referenced countervailing duty order. In the event of *such revocation*, liquidation may proceed without the assessment of countervailing duties. *In the absence of revocation, liquidation may proceed after the final and conclusive Court decision on the subject entries * * *.*

Fundamentally, of course, the terms of the preliminary injunction order with reference to liquidation of entries and revocation of a countervailing duty order must be read to harmonize with the pertinent statutory provisions for the injunction itself, for liquidation of entries the liquidation of which has been enjoined, and for revocation of countervailing duty orders. Thus, under both the statute and the express terms of the injunction, liquidation of entries is enjoined until (1) after the *final and conclusive Court decision in this action* covering the subject entries, or (2) after a *final decision in this or another action results*

in revocation of the countervailing duty order. Clearly, neither of the foregoing alternative events has occurred. Clearly, there was no "revocation" of the countervailing duty order by Commerce, but rather a "rescission" *ab initio.*

However, even *assuming arguendo* that Commerce's "rescission" of the countervailing duty order constituted a "revocation,"[5] as urged by Ferroven and defendant, nonetheless there still has been neither a final court decision in this action resulting in the so-called revocation of the order, nor has there been a final decision in any other action resulting in revocation of the countervailing duty order in this case. Plainly, the terms of the injunctions itself do not require dissolution, as contended by Ferroven.

3.

THE "CHANGED CIRCUMSTANCES" AND INEQUITIES ALLEGED BY FERROVEN.

Ferroven further contends that ITC's findings and negative injury determination and Commerce's action constitute changed circumstances that existed when the injunction was granted that make it inequitable to maintain the injunction, and place a burden on plaintiffs to now demonstrate the prerequisite elements of a preliminary injunction (particularly, *likelihood of success on the merits and irreparable harm)* to avoid dissolution. Ferroven further argues that the injunction should not be maintained in this case as a substitute for injunctive relief that properly should be sought by plaintiffs in the new pending cases challenging the recent ITC and Commerce actions.

Generally, of course, courts have inherent power and the discretion to modify injunctions for changed circumstances. *System Federation No. 91 v. Wright,* 364 U.S. 642, 647 (1961). *See also, Sierra Club v. U.S. Army Corps of Engineers,* 732 F. 2d 253, 256 (2d Cir. 1984), *cert. denied,* 475 U.S. 1084 (1984). However, a party moving for modification bears the burden of showing that changed circumstances, legal or factual, make the continuation of the injunction inequitable. *See e.g., Favia v. Indiana University of Pennsylvania, 7 F. 3d 332, 340 (3d Cir. 1993) ("In order to prevail on a motion to modify, the movant must establish a change in circumstances that would make the original preliminary injunction inequitable. * * *").*

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[5] The sometimes invoked principle, "if it looks like a duck, walks like a duck, and talks like a duck, it's a duck," does not apply here. There is no suggestion by Commerce in either its "Notice of Rescission," 64 Fed. Reg.51097 (Sept. 21, 1999), itself or in the procedures Commerce followed leading up to the order of rescission that Commerce intended to follow its regulations for revocation of the countervailing duty order. *See e.g. 19 C.F.R. §§ 351.221(b)(1), (4)(ii), (5); 351.222(g)(3)(i), (ii), (iv), (v); 351.309.* The Notice of Rescission is clear as to what action Commerce intended to take (rescission effective from the date of issuance), and the order is neither called, nor does it purport to be a revocation. Commerce's rescission action, effective from the date of issuance of the order, demonstrates clearly an intent, in light of the negative injury determination of ITC, to rescind *ab initio* rather than "revoke" the countervailing duty order.

The court is confident that Commerce knows how to go about revoking its orders. The agency chose no to do so. In point of fact, as previously mentioned, on July 28, 1998, Commission instituted changed circumstances reviews with respect to antidumping and countervailing duty orders covering imports of ferrosilicon from countries including Venezuela, 63 Fed. Reg. 40,314 (July 28, 1998), but on May 21, 1999, the Commission suspended those reviews and instituted new proceedings to reconsider its original affirmative injury determinations, and ultimately voted to reverse its original injury determinations. *See USITC Pub. 3218 (August 24, 1999).* Based on the reconsideration determinations, Commerce determined to "rescind" (not revoke) the orders. 64 Fed. Reg. 51,097 (September 21, 1999)("Notice of Rescission").

The preliminary injunction in the current case was granted *pendente lite*, as permitted by the statute, and once such injunction is granted, a party moving for dissolution must make a very compelling demonstration, both of changed circumstances and resulting inequities for the moving party, to justify dissolution of the injunction prior to a final decision on the merits of the action. Since here prior to a final decision on the merits, dissolution of the preliminary injunction may eviscerate the remedial effects conferred by the countervailing duty statute (*i.e.*, assessment of countervailing duties on the entries the liquidation of which have been enjoined), the potential for a dissolution prior to a final decision to cause irreparable harm to plaintiffs is obvious.

Moreover, the alleged changed circumstances, based on the factual findings of the ITC underlying its reconsideration of its affirmative injury determination[6] and Commerce's rescission of the countervailing duty order, are at this juncture simply contested *administrative* findings subsequent to the countervailing duty order subject to judicial review. Until there has been an adjudication of the validity of the findings, proceedings, and action taken by the agencies, the court sees no basis for finding the injunction to be inequitable, or justification for dissolving the preliminary injunction. If, after a dissolution of the injunction, plaintiffs were ultimately to prevail in the currently pending cases (which includes those cases in which ITC's negative injury determination and Commerce's rescission are contested), entries liquidated without assessment of countervailing duties could not be reliquidated with assessment of countervailing duties in accordance with the final court decision in this case.

For all the foregoing reasons, and in the exercise of the court's discretion, defendant-intervenor's motion to dissolve is denied.

4.

Stay of Further Proceedings.

The resolution of the issues pending in the new cases contesting the validity of ITC's negative injury determination and Commerce's rescission of the countervailing duty order could vitally impact the viability of the current and future proceedings in the instant case. If, for example, should Commerce's rescission of the countervailing duty order *ab initio* be ultimately sustained in other pending cases, with no valid countervailing duty order in this case, all subsequent judicial review becomes moot. *See Verson v. United States*, 5 F. Supp. 2d 963, 966 (CIT 1998).

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[6] Ferroven posits that the injunction was wrongfully obtained by plaintiffs, and therefore, should be dissolved because of the alleged price-fixing and deceptive conduct by the domestic producers of ferrosilicon, as found by the ITC. The alleged wrongful conduct of plaintiffs has not been judicially established, and ITC's findings of price fixing and deceptive conduct have yet to be litigated in other cases. It would be entirely imprudent for this court to, in effect, preemptively adjudicate the contested factual findings concerning alleged wrongdoing which are not before this court in order to dissolve the preliminary injunction.

In light of the distinct possibility of mootness and resulting loss of jurisdiction,[7] and in the interest of judicial economy and avoidance of possibly further unnecessary proceedings conducted at considerable expense to the parties, it is hereby **ORDERED** *sua sponte* that further proceedings in this case be stayed pending final resolution of whether Commerce's rescission of the countervailing duty order is valid.

Plaintiffs' application for leave to file a response to defendant's response to Ferroven's motion to dissolve the preliminary injunction is denied.

(Slip Op. 99–130)

SOUTHERN STAR, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 91–01–00060

(Dated December 10, 1999)

JUDGMENT ORDER

WATSON, *Senior Judge:* The United States Department of Commerce submitted its *Results of Redetermination* in accordance with this Court's Remand order of May 13, 1994, in the case of *Southern Star, Inc., et al. v. United States*, Consolidated Court No. 91–01–00060. The Department of Commerce requested this remand pursuant to the remand from the Court in *Creswell Trading Company, Inc., et al. v. United States*, Consol. Court No. 91–01–00012, Slip Op. 98–87. In its Redetermination of the 1986 administrative review, Commerce recalculated the company-specific subsidy rates by revising the rates relating to India's International Price Reimbursement Scheme (IPRS). The new company-specific and all other rates applicable to the 1986 period of review are as follows:

Crescent Foundry Co. Pvt. Ltd.	9.07%
Kejriwal Iron & Steel Works	23.75%
Govind Steel	128.60%
Uma Iron & Steel Co./Commex Corp.	30.24%
All Others	16.66%

These rates have been stipulated to and accepted by all parties to this action.

The Court having reviewed the Redetermination Results, Commerce having complied with the Court's Remand, and the parties having stipulated to the new rates, it is hereby

[7] Because Article III of the Constitution precludes the court, after the case becomes moot, from continuing to exercise jurisdiction or issuing merely an advisory opinion, *see Associacao dos Industriais der Cordoariae Redes v. United States*, 17 CIT 754, 759, 828 F. Supp. 978, 984 (1993), a final judicial decision sustaining Commerce's rescission of the countervailing duty order *ab initio* would moot the current case and require its dismissal for lack of jurisdiction.

ORDERED that the Redetermination Results are affirmed; and it is further

ORDERED that the rates listed above shall become the new rates for the 1986 period, and it is further

ORDERED that, as the parties have stipulated that they will not litigate any other issues, this action is dismissed.

(Slip Op. 99–131)

SUPER CASTINGS, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 91–09–00659

(Dated December 10, 1999)

JUDGMENT ORDER

WATSON, *Senior Judge:* The United States Department of Commerce submitted its *Results of Redetermination* in accordance with this Court's Remand order of May 13, 1994, in the case of *Super Castings, et al. v. United States,* Consolidated Court No. 91–09–00659. The Department of Commerce requested this remand pursuant to the remand from the Court in *Creswell Trading Company, Inc., et al. v. United States,* Consol. Court No. 91–01–00012, Slip Op. 98–87. In its Redetermination of the 1987 administrative review, Commerce recalculated the company-specific subsidy rates by revising the rates relating to India's International Price Reimbursement Scheme (IPRS). The new company-specific and all other rates applicable to the 1987 period of review are as follows:

Crescent Foundry Co. Pvt. Ltd.	8.25%
Kejriwal Iron & Steel Works	7.18%
RSI India Pvt. Ltd.	9.42%
Uma Iron & Steel Co.	7.56%
Super Castings (India)	37.96%
Select Steel	37.17%
Commex	24.39%
All Others	18.62%

These rates have been stipulated to and accepted by all parties to this action.

The Court having reviewed the Redetermination Results, Commerce having complied with the Court's Remand, and the parties having stipulated to the new rates, it is hereby

ORDERED that the Redetermination Results are affirmed; and it is further

ORDERED that the rates listed above shall become the new rates for the 1987 period, and it is further

ORDERED that, as the parties have stipulated that they will not litigate any other issues, this action is dismissed.

(Slip Op. 99–132)

UNITED STATES OF AMERICA, PLAINTIFF *v.* COMPLEX MACHINE WORKS CO., ANDRAS NYAKAS, ANDRAS NYAKAS D/B/A COMPLEX MACHINE WORKS CO. AND ANDRAS H. NYAKAS, DEFENDANTS

Court No. 95–10–01319

[Following trial to determine proper amount of penalty under 19 U.S.C. § 1592, penalty of $400,000.00 imposed.]

(Decided December 14, 1999)

David Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, *Ming-Yuen Meyer-Fong*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Plaintiff.

Neville, Peterson & Williams (John M. Peterson and *Curtiss W. Knauss)* for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WALLACH, *Judge:* This matter having come on for trial in New York, New York, on April 5, 1999, the parties having submitted it for decision and judgment after completion of the trial on April 5, 1999, the Court having considered the Defendants' Post-Trial Brief On Penalty Assessment ("Defendant's Brief") submitted on May 3, 1999, Plaintiff's Post-Trial Brief ("Plaintiff's Response") submitted on May 17, 1999 and the Joint Stipulations dated April 5, 1999, and having given due consideration to the testimony of all witnesses, together with due consideration of all stipulated facts and all evidence admitted at trial, and the Court having granted Plaintiff's Motion for Partial Summary Judgment per Order dated February 23, 1999, now the Court, pursuant to USCIT Rule 52(a), finds facts and sets forth its conclusions of law, and enters Judgment for Plaintiff pursuant to these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Plaintiff, the United States Customs Service (hereinafter "Customs") filed this action on October 17, 1995 to recover civil monetary penalties[1] under section 592 of the Trade Act, as amended, 19 U.S.C. § 1592 (1988) with respect to 64 separate entries of machine parts into the United States.

Defendant Andras Nyakas (hereinafter "Nyakas") was president of Defendant Complex Machine Works Co. ("Complex"), a Canadian corporation, which imported machinery parts from Canada into the United States.[2] Defendant Andras H. Nyakas (hereinafter "Andras H."), the son of Andras Nyakas, was employed by Complex.

On October 18, 1990, Senior Customs Inspector Dale Peterson ("Peterson") discovered that Andras H. attempted to enter machine parts

[1] The Government recovered the lost duties in a parallel criminal action.

[2] Complex filed for bankruptcy in 1991. Pretrial Order at 2. Defendant Nyakas currently owns and operates Subco Engineering, Inc. ("Subco"), another Canadian corporation which engages in the same type of business as Complex. Pl. Exh. 9 at 12.

into the United States without paying duties, by hiding those machine parts in the trunk of his car. Pretrial Order at 2; Tr. at 38. During the inspection on October 18, 1990, in response to questioning by Peterson, Andras H. made false statements about the contents of his automobile trunk, ownership of the automobile and how the merchandise found its way into the trunk. Tr. at 38–43. At that time, Customs seized the merchandise, but later that day, Andras H. paid a mitigated penalty of $500 and Customs released the merchandise. Pretrial Order at 2; Tr. at 48; Pl. Exh. 1 at 32.

The smuggling incident prompted an investigation[3] led by Customs Agent Nathan Lavoie ("Lavoie") into other entries of merchandise into the United States by Complex. Tr. at 54; Pretrial Order at 2–3. Lavoie discovered that on 35 separate occasions, Defendants failed to submit properly valued invoices to Customs for merchandise entries. Pretrial Order at 3. In addition, on 29 separate occasions, Defendants entered merchandise into the United States destined to two customers, Alpha Tube and Sterling Pipe, and failed to declare them to Customs. *Id.*

In interviews with Lavoie and Peterson, Andras H. and Nyakas provided inconsistent and misleading answers regarding the number of employees working at Complex, and the extent of Defendants' compliance with the Customs laws on prior occasions. Tr. at 38–42, 66, 68.

On November 4, 1992, the United States obtained a criminal indictment against Nyakas for 24 counts of violating 18 U.S.C. § 1001 (false statements) and 25 counts of violating 18 U.S.C. § 545 (smuggling). Pl. Exh. 2 at 1–4. Nyakas and Andras H. were also indicted for one count of smuggling. Pl. Exh. 2 at 4. Both Nyakas and Andras H. pled guilty to those charges. Pretrial Order at 3, 4; Pl. Exh. 3.

On December 31, 1992, Customs issued a pre-penalty notice to Defendants and gave them an opportunity to submit information to Customs for mitigation. Defendants did not respond. On October 17, 1995, Customs filed a Summons and Complaint in this Court for collection of civil penalties for these violations.

By Order dated August 23, 1996, the Court denied Defendants' motion to dismiss, rejecting their Statute of Limitations and Double Jeopardy arguments. *United States v. Complex Machine Works Co.*, 937 F. Supp. 943, 945 (CIT 1996). On August 23, 1996, the Court entered an Order denying Defendants' Motion To Dismiss Plaintiff's Complaint. On March 31, 1998, Plaintiff filed a Motion For Partial Summary Judgment seeking liability as to all but a few of the entries allegedly fraudulently made by Defendants.

On June 25, 1998, in light of representations by counsel for Defendants, the Court entered an Order memorializing those representations and specifically holding that:

> * * * settlement, if any, shall be completed and the appropriate paperwork filed with the Court on or before August 25, 1998; and [that] if no settlement is reached Defendant's Response to Plain-

[3] During his investigation of these violations, Lavoie expended approximately 1,450 hours investigating the case. Tr. at 69–70.

> tiff's Motion * * * if any, shall be filed on or before August 25, 1998; and [that] if no settlement is reached and Defendant has not filed a Response to Plaintiff's Motion For Partial Summary Judgment, the Court will grant Plaintiff's Motion for Partial Summary Judgment *sua sponte* and without further notice.

Thereafter, the parties requested and received a number of additional extensions of time within which to seek to settle this case. During several status conferences held during that period, the Court specifically reminded Defendants' counsel that the June 25, 1998 Order was still in effect, and that Defendants would not be permitted to file any Response to Plaintiff's pending Motion if settlement was not reached.

On February 23, 1999, the parties informed the Court that they had reached an impasse regarding settlement. The Court entered an Order granting Plaintiff's pending motion for summary judgment, specifically finding that:

> * * * Defendants fraudulently violated 19 U.S.C. §1592(a) with respect to the 49 entries described in exhibit 1 attached to Plaintiff's Memorandum in Support of Its Motion For Partial Summary Judgment * * *.

The Order covered Entries 1–25 of Exhibit A and Entries 1–24 of Exhibit B attached to Plaintiff's Complaint.[4]

Following the Court's determination of partial liability, the parties then stipulated that Defendants Complex and Andras Nyakas, by inten-

[4] Entries 1–25 of Exhibit A are violations for the use of false documents and include:

	Entry Number	*Date*	*Declared Value*	*True Value*
1.	G170018047–5	04/20/91	$2,401.00	$13,108.00
2.	G170017991–5	03/11/91	3,182.00	13,657.00
3.	G170017882–1	11/23/90	1,605.00	4,797.00
4.	G170017833–9	11/23/90	1,721.00	6,447.00
5.	G170017726–5	09/05/90	3,091.00	17,096.00
6.	G170017674–7	07/18/90	3,179.00	16,441.00
7.	G170017620–0	06/01/90	3,720.00	24,776.00
8.	G170017545–9	05/10/90	3,232.00	4,500.00
9.	G170017521–0	05/04/90	1,570.00	9,628.00
10.	G170017502–2	05/01/90	1,616.00	7,772.00
11.	G170017370–2	03/13/90	4,242.00	35,898.00
12.	G170017067–4	01/03/90	4,948.00	28,760.00
13.	G170016678–9	09/14/89	1,919.00	10,255.00
14.	G170016553–4	07/31/89	3,703.00	9,830.00
15.	G170016508–8	07/06/89	1,733.00	8,850.00
16.	G170016374–5	06/13/89	1,496.00	7,269.00
17.	G170016173–1	05/22/89	3,592.00	16,926.00
18.	G170011845–9	03/31/89	3,403.00	19,130.00
19.	G170011510–9	12/27/88	3,235.00	22,209.00
20.	G170011276–7	10/04/88	3,578.00	18,775.00
21.	G170011197–5	09/01/88	7,984.00	42,666.00
22.	1121857926–3	06/27/88	3,511.00	12,682.00
23.	1121801341–2	03/22/88	2,640.00	18,207.00
24.	1121769318–0	02/18/88	3,037.00	16,338.00
25.	1121755462–2	12/10/87	2,630.00	19,705.00

Continued

tional fraud, violated 19 U.S.C. § 1592 in connection with Entries 26–35 of Exhibit A to the Complaint, and Entries 25–29 of Exhibit B.[5] Under the terms of that Stipulation, Plaintiff does not seek a final judgment against Defendant Andras H. as to these Entries. However, Andras H. remains liable for the Entries covered by the Court's earlier grant of partial summary judgment and Plaintiff seeks to recover a monetary penalty against Andras H. for these Entries.

At trial, the parties stipulated that the total domestic true value of the merchandise covered by Entries 1–25 of Exhibit A and Entries 1–24 of

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The 24 Entries of smuggled merchandise listed in Exhibit B are:

	Date	*Invoice Number*	*True Value*
1.	02/28/91	029101	$2,250.00
2.	02/28/91	029102	3,450.00
3.	10/20/90	1232	1,078.00
4.	09/20/90	1245	4,445.00
5.	09/14/90	1158	1,710.00
6.	02/28/89	1393	3,000.00
7.	02/16/89	1194	4,500.00
8.	02/06/89	1392	5,250.00
9.	12/27/88	1354	1,975.00
10.	12/27/88	1353	1,350.00
11.	12/27/88	1351	1,375.00
12.	12/27/88	1348	1,450.00
13.	12/22/88	1346	2,340.00
14.	10/08/88	1186	616.00
15.	05/19/88	1285	1,285.00
16.	05/19/88	1289	690.00
17.	05/19/88	1283	840.00
18.	05/18/88	1302	4,450.00
19.	05/18/88	1258	2,960.00
20.	05/17/88	1183	3,325.00
21.	05/17/88	1114	3,300.00
22.	05/16/88	1060	2,050.00
23.	05/12/88	1288	1,316.00
24.	05/12/88	1291	4,272.00

[5] The 10 entries listed in Exhibit A are:

	Invoice Number	*Date*	*Declared Value*	*True Value*
1.	1120876838–9	10/01/87	$2,325.00	$19,587.00
2.	1120858953–8	08/21/87	1,804.00	17,385.00
3.	1120852868–4	07/22/87	1,184.00	5,945.00
4.	1120835155–8	05/26/87	7,370.00	29,454.00
5.	1120269625–5	03/09/87	4,151.00	36,330.00
6.	1120256440–4	02/10/87	1,341.00	7,065.00
7.	20186690507	09/17/86	2,180.00	13,300.00
8.	20186686762	08/28/86	2,601.00	11,575.00
9.	20186680206	07/24/86	1,427.00	8,667.00
10.	20186674100	06/24/86	3,087.00	14,842.00

The five entries listed in Exhibit B are:

	Date	*Invoice Number*	*True Value*
1.	05/08/87	1209	$1,570.00
2.	04/07/87	1208	5,630.00
3.	12/18/86	1206	5,680.00
4.	09/30/86	1166	5,232.00
5.	09/30/86	1165	3,825.00

Exhibit B is $499,547.00, and that the total domestic true value of the merchandise covered by Entries 26–35 of Exhibit A and Entries 25–29 of Exhibit B is $187,222.00. Plaintiff seeks the maximum penalty allowed under 19 U.S.C. 1592 for these violations, for a total of $686,769.00. Defendants have paid no part of the penalties demanded by Customs.

At trial, Defendants called no witnesses, but submitted into evidence their tax returns and unaudited financial statements, asserting an inability to pay the maximum penalty sought by Plaintiff. Defendants seek a penalty of less than $30,000.00.

Conclusions of Law

A

The Standards Governing Penalties Under § 1592 Need To Be Clarified

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581. The only issue before the Court is the amount of the penalty due under 19 U.S.C. §1592. 19 U.S.C. §1592(a)(1) states:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
> (ii) any omission which is material * * *.

In actions brought for the recovery of any monetary penalty claimed under 19 U.S.C. §1592, all issues are tried *de novo*, including the amount of the penalty. 19 U.S.C. § 1592(e)(1). "[T]he law requires the court to begin its reasoning on a clean state. It does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by the government has any special weight." *United States v. Menard, Inc.*, 17 CIT 1229, 1229, 838 F. Supp. 615, 616 (1993), *aff'd in part, vacated and remanded in part on other grounds*, 64 F.3d 678 (Fed. Cir. 1995). The maximum penalty for a fraudulent violation of §1592 is "an amount not to exceed the domestic value of the merchandise." 19 U.S.C. §1592(c).

Prior to the enactment of the Customs Procedural Reform and Simplification Act of 1978 ("Customs Reform Act"), monetary penalties under §1592 were imposed without regard to the degree of culpability. The statute required forfeiture of the merchandise itself, or payment of a fine equal to its domestic value. *See* S. Rep. No. 778, pt. 10, *reprinted in* 1978 U.S.C.C.A.N. 2211. The Court had no authority to vary the amount of the statutory penalty. *Id.*

With passage of the Customs Reform Act, "[t]he monetary penalty [was] changed from a fixed amount, the domestic value of the goods, to

an amount varying according to the culpability of the importer." *Id.*[6] For the first time, "the appropriateness of the amount of the penalty [became] a proper subject for judicial review." *Id.*; *see United States v. Modes, Inc.*, 17 CIT 627, 635, 826 F. Supp. 504, 512 (1993) ("It is settled * * * that the court possesses the discretion to determine a penalty within the parameters set by the statute."). Thus, by statutory direction, the Court must now consider the degree of culpability of the defendant in making its penalty determination. *See United States v. Thorson Chemical Corp.*, 16 CIT 441, 452, 795 F. Supp. 1190, 1199 (1992) ("The degree of culpability is a relevant factor for the Court in assessing a penalty under section 1592.").

Although Congress amended the penalty statute to account for different levels of culpability and penalty amounts, the statute and legislative history fail to enumerate any factors, either mitigating or aggravating, to be applied by a court making a penalty determination.[7] In contrast, other federal statutes providing for discretionary imposition of civil penalties set forth specific factors to guide the decisionmaker in the determination of the proper penalty amount. *See e.g.*, the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30165(c) (1994) (requiring court to consider "the size of the business of the person charged and the gravity of the violation); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a)(3) (1986); the Clean Water Act, 33 U.S.C. § 1319(d) (1990) (requiring court to consider, *inter alia*, seriousness of the violation, economic benefit, history of violations, good faith efforts to comply, and economic impact of the penalty); *see also United States v. Anthony Dell'Aquilla Enterprises*, 150 F.3d 329, 339 (3d Cir. 1998) (vacating and remanding penalty amount to district court for failure to consider mitigating factor of ability to pay).

In *Modes*, the Court looked to these and other discretionary penalty statutes,[8] and decisions assessing penalties under those statutes, as the basis for a list of factors which could be applied by a court in § 1592

[6] The amended provisions of §1592 provide for a penalty for fraudulent violations of the statute "not to exceed the domestic value of the merchandise." §1592(c)(1). Section 1592 imposes lesser penalties for two other degrees of culpability, gross negligence and negligence. *See* §§1592(c)(2) and (c)(3).

[7] "Although 'a defendant in a section 1592 action may be forced to pay the greatest penalty applicable under that provision even if his unlawful conduct did not result in any loss of revenue to the United States * * * the legislative history makes clear that an important motivation for amending section 1592 was Congress' desire to alleviate the harsh consequences of the forfeiture penalty.'" *United States v. Snuggles, Inc.*, 937 F. Supp. 923, 927 (CIT 1996) (citation omitted).

[8] *Modes* cited *Federal Election Comm'n v. Furgatch*, 869 F.2d 1256, 1256 (9th Cir. 1989) for the proposition that where explicit statutory mitigation factors are lacking "* * * the court is guided by provisions in other statutes relating to the discretionary imposition of civil penalties." 826 F. Supp. at 512. This Court accepts the proposition as useful for the reasons set forth herein, but, of course, recognizes that it is not bound by such authority. *Algoma Steel Corporation v. U.S.*, 865 F.2d 140, 243 (Fed. Cir. 1989).

cases.[9] The Court held that "[a] representative sampling[10] of such penalty statutes" suggested a "non-exclusive list of possible mitigation factors in the context of section 1592." Those factors were:

1. the defendant's good faith effort to comply with the statute,
2. the history of previous violations,
3. the nature and circumstances of the violation at issue,
4. the degree of harm to the public,
5. the defendant's ability to pay,
6. the appropriateness of the penalty to the size of the defendant's business and the effect of the penalty on the defendant's ability to continue in business,
7. the economic benefit to the defendant of the violation,
8. the value of vindicating the agency authority,
9. the gravity of the violation, and
10. such other matters as justice may require.

Although the *Modes* opinion implied that each of the ten factors appeared somewhere in the cited statutes, it appears that the Court derived some of the enumerated factors from other statutes or from uncited decisions. The *Modes* Court also referenced, but did not apply, additional unenumerated considerations, which it derived from the First Circuit's decision in *United States v. Ven-Fuel, Inc.*, 758 F.2d 741 (1st Cir. 1985) (applying earlier version of § 1592). Those factors included:

1. the character of the defendant's offense;
2. the nature of the public interest in ensuring compliance with the regulations involved;
3. proportionality of the penalty to the offense; and
4. that the penalty not otherwise be shocking to the conscience of the Court.

See Modes, 17 CIT at 636 n. 10 and 639, 826 F. Supp. at 513 n.10 and 515 (citing *Ven-Fuel*).

Unfortunately, after enumerating these factors, the *Modes* court did not explicitly articulate its application of the factors to the facts before

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[9] Other courts have used a "top-down" or, in some cases, a "bottom-up" method of calculation in determining civil penalties under the Clean Air Act, the Clean Water Act and RCRA. *See, e.g.*, *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 858 (S.D. Miss. 1998) (listing representative cases applying each method). Under the former method, the statutory maximum provides the presumptive penalty amount, which is adjusted downward in light of any mitigating factors. The *Modes* court rejected this method, noting that it is "not required" by the terms of § 1592. 17 CIT at 635, 826 F. Supp. at 512. Under the latter method, the presumptive penalty is zero, and is augmented in light of aggravating factors. This Court has not located any instances in which a "top-down" or "bottom-up" method has been applied in determining a penalty under § 1592, and declines to adopt such an approach. Moreover, the Court notes that a top-down approach does not allow for the increase of a penalty in light of those among the listed factors which take into account aggravating circumstances, while a "bottom-up" approach is subject to similar infirmities.

The *Modes* court also declined to limit its analysis to the list of mitigating and aggravating factors identified by Customs at 19 CFR § 171, Appendix B(F) and (G) (1999). *Modes*, 17 CIT at 635–36, 826 F. Supp. at 512 ("Nor is the court's discretion limited by the penalty assessed by Customs pursuant to its regulatory mitigation guidelines."). Those factors provide for mitigation where there is evidence of: 1) contributory Customs error, 2) cooperation with the investigation, 3) immediate remedial action, 4) inexperience in importing or 5) prior good record. Customs' factors provide for aggravation where a defendant has obstructed the investigation, withheld evidence, or provided misleading information.

[10] That sampling included: the Flammable Fabrics Act, 15 U.S.C. 1194(e)(2) and (3) (1990), the Clean Water Act, 33 U.S.C. 1319(d) (1990), the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(l)(a)(4) (1991), the Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C. 1818(i)(2) (1998), the Federal Mine Safety and Health Act, 30 U.S.C. 820(i) (1990), the Clean Air Act, 42 U.S.C. 7413(e) (1990), the Toxic Substances Control Act, 15 U.S.C. 2615(a)(2)(B) (1992), and the Hazardous Materials Transportation in Uniform Safety Act, 49 U.S.C. 5123 (1994) (formerly 49 U.S.C. 1809(a)(1)).

it.[11] This omission leaves the Court without significant guidance as to the proper application of those factors to the instant case.

In this opinion, we attempt to put flesh on the skeletal factors set forth in *Modes*. To this end, we have surveyed all comparable federal statutes that this Court has been able to locate in order to articulate a more comprehensive list of relevant factors. We now apply these factors to analysis of cases arising under § 1592(c). Such a principled analytical framework seems to the Court a useful basis for resolution of the case before it, for evaluation of future cases, and for that predictability of results by parties contemplating action which is the essence of our legal system.

This Court has identified numerous federal laws, in addition to the statutes cited in *Modes*, which articulate factors relevant to a determination of civil penalties.[12] The Court has distilled, from these statutes and those cited by the *Modes* court as well as from the *Ven-Fuel* decision, fourteen factors relevant to the imposition of civil penalties. Those include:

1. the defendant's good faith effort to comply with the statute,
2. the defendant's degree of culpability,
3. the defendant's history of previous violations,
4. the nature of the public interest in ensuring compliance with the regulations involved,
5. the nature and circumstances of the violation at issue,
6. the gravity of the violation,
7. the defendant's ability to pay,
8. the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business,

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[11] The *Modes* court discussed the enumerated factors of the defendant's good faith, its history of violations, the nature of the offense, the extent of the defendant's culpability, the degree of harm to the public, the vindication of agency authority, the defendant's ability to pay, the defendant's ability to remain in business, and benefit to the defendant of the violation. It also discussed the relationship of the penalty to the size of the business, and the nature of the public interest in enforcement of the regulations involved; those factors appear to have derived from the *Ven-Fuel* decision.

[12] The Court has located the following acts which set forth criteria for consideration in connection with the imposition of civil penalties: the Swine Health Protection Act, 7 U.S.C. 3805(a) (1980); the Horse Protection Act, 15 U.S.C. 1825(b)(1) (1976); the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. 2647(c) (1990); the Fastener Quality Act, 15 U.S.C. 5408(b)(2) (1999); the Northern Pacific Halibut Act of 1982, 16 U.S.C. 773f(a) (1982); the South Pacific Tuna Fishing Act, 16 U.S.C. 973f(a) (1988); the Fishery Conservation and Management Act, 16 U.S.C. 1858(a) (1996); the Antarctic Marine Living Resources Convention, 16 U.S.C. 2437(a)(1) (1984); the Lacey Act, 16 U.S.C. 3373(a)(6) (1996); the Federal Cave Resources Protection Act, 16 U.S.C. 4307(a)(1) (1988); the North Pacific Anadromous Stocks Convention, 16 U.S.C. 5010(a)(1) (1992); the High Seas Fishing Compliance Act, 16 U.S.C. 5507(a)(1), (b)(2) (1995); the Enforcement of the Communications Assistance for Law Enforcement Act, 18 U.S.C. 2522(c)(2) (1994); the National Education Reform Act, 20 U.S.C. 6083(f)(3) (1994); the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 333(f)(3)(B) (1996); the Egg Products Inspection Act, 21 U.S.C. 1041(c)(1)(C)(i) (1996); the Chemical Weapons Convention Implementation Act, 22 U.S.C. 6761(a)(2)(D) (1998); the Prevention of Pollution From Ships Act, 33 U.S.C. 1908(b)(2) (1996); the Organotin Antifouling Paint Control Act, 33 U.S.C. 2409(a)(2) (1988); the Shore Protection From Municipal or Commercial Waste Act, 33 U.S.C. 2608(a) (1988); the Oil Pollution Liability and Compensation Act, 33 U.S.C. 2716a(a) (1990); the Nonmailable Matter Act, 39 U.S.C. 3012(b)(2) (1983); the Atomic Energy Act, 42 U.S.C. 2282a(b)(2) (1992); the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)(3) (1986); the Ocean Thermal Energy Conversion Act, 42 U.S.C. 9152(c)(1) (1984); the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11045(b)(1)(C) (1986); the Americans with Disabilities Act, 42 U.S.C. 12188(b)(5) (1990); the Public Health and Welfare Act, Management of Rechargeable Batteries and Batteries Containing Mercury, 42 U.S.C. 14304(c) (1996); the Vessels and Seamen Act, 46 U.S.C. 2107(a) (1983); the International Ocean Commerce Transportation Act, 46 App. U.S.C. 1712(c) (1998); the Department of Transportation Act, 49 U.S.C. 336 (1989)(a), 49 U.S.C. 521(b)(2) (1998); the Motor Carriers, Water Carriers, Brokers and Freight Forwarders Act, 49 U.S.C. 14901(c) (1995); the Railway Safety Act, 49 U.S.C. 21301(a)(3) (1996); the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. 30165(c) (1994); the Commercial Motor Vehicle Safety Act (transporting passengers), 49 U.S.C. 31138(d)(2) (1995); the Commercial Motor Vehicle Safety Act (transporting property), 49 U.S.C. 31139(f)(2) (1995); the Motor Vehicle Information and Cost Savings Act, 49 U.S.C. 32709(a)(3) (1994); the Federal Aviation Act, 49 U.S.C. 46301(e) (1997); and the Pipeline Safety Act, 49 U.S.C. 60122(b) (1994).

9. that the penalty not otherwise be shocking to the conscience of the Court,
10. the economic benefit gained by the defendant through the violation,
11. the degree of harm to the public,
12. the value of vindicating the agency authority,[13]
13. whether the party sought to be protected by the statute had been adequately compensated for the harm, and
14. such other matters as justice may require.

As one commentator has noted, monetary penalties may serve one of two conceptually distinct purposes: motivation of behavior and compensation for harm to society. Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1461 (1979). It appears that § 1592 is driven primarily by considerations of deterrence rather than compensation, as the statute's maximum penalty for fraud would bear a reasonable relationship to societal harm only in a system of 100 per cent tariffs.[14]

For the most part, the factors identified above relate to deterrence. Good faith effort to comply, degree of culpability, and history of violations are indicia of the *defendant's character*; the nature of the public interest in ensuring compliance with the regulations involved, the nature and circumstances of the violation at issue and the gravity of the violation go to the *seriousness of the offense*; the defendant's ability to pay, the appropriateness of the size of the penalty to the size of the defendant's business, the effect of the penalty on the defendant's ability to continue in business, and the concern that the penalty not shock the conscience of the Court go to the *practical effect of the imposition of the penalty*; and the economic benefit the defendant gained by the violation considers the *benefit gained by defendant* as a factor in deterrence. The degree of harm to the public, the adequacy of prior compensation to the party sought to be protected by the statute, and the value of vindicating agency authority are *public policy concerns* which consider compensation for harm to society.[15] Thus, because of the clear Congressional preference for deterrence in this statute, this Court will, in its analysis of penalties under §1592, give more weight to the deterrence factors identified above and less to those designed to compensate society.

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[13] This factor is commonly derived from opinions interpreting certain other civil penalty statutes which do not contain statutorily mandated factors. *See, e.g.*, *United States v. Barkman*, 784 F. Supp. 1181, 1189 (E.D. Pa. 1992) (determining proper penalty amount under CERCLA, 42 U.S.C. 9604); *Furgatch*, 869 F.2d at 1258 (determining penalty amount under the Federal Election Campaign Act).

[14] That is to say, where in the case of fraud Congress sets the penalty at an amount "not to exceed the domestic value of the merchandise," 19 U.S.C. §1592, it is clearly motivated by factors of deterrence rather than compensation, since very high tariffs, in the absence of other factors, are outside the normal GATT regime.

This conclusion is further supported by Congress' decision to tie diminished levels of culpability to alternative, lesser maximum penalties. *See* §1592(c)(2) (providing a civil penalty for gross negligence "*not to exceed* (A) the lesser of (i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived or (B) if the violation did not affect the assessment of duties, 40 per cent of the dutiable value of the merchandise") and §1592(c)(3) (providing a penalty for negligent violations, with a penalty limit of two times the amount of lawful duties and 20 per cent of the dutiable value).

[15] There is also a general discretion provision for "other such matters as justice may require," found in these and most statutory schemes involving courts of general legal and equitable powers.

B

ANALYSIS OF DETERRENCE FACTORS IN THIS CASE PLACES DEFENDANTS IN THE HIGH RANGE OF POTENTIAL PENALTIES

1

DEFENDANTS' CHARACTER

A

GOOD FAITH EFFORT TO COMPLY

A strong indicator of Defendant's character is whether there was a good faith effort to comply with the statute. This Court fails to identify any evidence which would indicate a good faith effort to comply on the part of Defendants. It is undisputed that Defendants knowingly entered goods by means of a material false statement, and that they intentionally violated the laws of the United States by not disclosing the true value of imported merchandise and moreover, by failing to disclose the importation of certain merchandise. Tr. at 6–7. *See United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1999 WL 173695 at *5 (Fed. Cir. 1999). Indeed, after Customs stopped and penalized Andras H. for violating the U.S. Customs laws on October 18, 1990, Defendants continued to violate the statute by misrepresenting the value of the imported merchandise. *See* Complaint Ex. 1; Pretrial Order at 4. Even when questioned by Customs, Nyakas and Andras H. provided inconsistent, false and uncooperative explanations and answers.

Defendants argue that analysis of "defendants' good faith effort to comply with the statute [should be] colored by the defendants' lack of sophistication in Customs matters and reliance on their Customs broker's advice." Defendants' Brief at 6. Defendants further assert that once they 'became aware of the need to file entries for their sales to U.S. customers, they enlisted the aid of a Customs broker. The Customs broker provided the necessary entry forms but did not explain the legal implications of listed values of the imported merchandise which defendants misstated in their subsequent entries of machine tools." *Id.* The Court flatly rejects these arguments as there is no basis whatsoever in the record to support these allegations.

Application of the good faith effort to comply factor, therefore, does not weigh in Defendants' favor, but rather tends to demonstrate bad character and supports the imposition of a heavier penalty.

B

DEGREE OF CULPABILITY

From the stipulated facts and the evidence adduced at trial, it is plain that Defendants specifically intended to evade the United States customs duties. Although Defendants argue that their actions "were motivated by a desire to avoid delays in Customs clearance as well as the time and cost attendant in retaining a Customs broker," Defendants' Brief at 7, they have failed to identify, and the Court has not discovered, any record evidence of such motivation. The Court accordingly declines to ac-

cept Defendants' argument as valid. It is evident from Defendants' longstanding and continuous scheme to defraud the government, and the lies they told while being interviewed, Tr. at 38–43 and 64–69, that there was a high degree of culpability. Consequently, this factor weighs in favor of a heavier penalty.

C

HISTORY OF VIOLATIONS

Another factor useful in assessing character is the Defendants' history of previous violations. "In determinating the 'history of such violations,' courts consider the duration of defendants' current violations, whether defendants have committed similar violations in the past, and the duration and nature of all such violations, including whether the violations are perpetual or sporadic." *United States v. Gulf Park Water Co., Inc.*, 14 F. Supp. 2d 854, 864 (S.D. Miss. 1998) (assessing penalty for violation of Clean Water Act). There is no history of prior violations by Defendants of the Customs laws, a factor which might weigh in favor of Defendants. However, the violations admitted by Defendants in this case cover a lengthy period—almost five years. The Court considers the longstanding nature of Defendants' violations to be significant, and therefore takes into consideration against Defendants the duration of their current violations.

2

SERIOUSNESS OF THE OFFENSE

A

NATURE OF THE PUBLIC INTEREST

A significant public interest in the enforcement of the regulations at issue militates in favor of a heavier penalty. The public interest at issue in this case is the truthful and accurate submission of documentation to Customs and the full and timely payment of duties required on imported merchandise. These are weighty interests, contravention of which necessitates the imposition of a penalty of some substance. *See Modes*, 17 CIT at 638, 826 F. Supp. at 514. Indeed, the *Modes* case did not involve any unpaid duties, yet the court emphasized the importance of the public interest at stake.

B

NATURE AND CIRCUMSTANCES OF THE VIOLATIONS

The nature and circumstances of Defendants' violations present a picture of egregious disregard for the Customs laws of this country. At the time Andras H. was initially detained, he was attempting to smuggle goods into the country to avoid payment of duties. He responded untruthfully to Customs' questions at the time. Following the payment of the initial penalty, which provided unequivocal notice of the requirements of payment of duties, Defendants continued their attempts to evade Customs duties, both by lying during the subsequent investiga-

tion and by underreporting subsequent shipments. This factor weighs heavily in favor of a significant penalty.

C

GRAVITY OF THE VIOLATION

Gravity of the violation may be evaluated in terms of the frequency of the violations, the amount of the duties at issue, and the domestic value of the imported goods. Defendants have stipulated to violations of the Customs laws which occurred on fifty-three separate dates, and implicated goods having a total domestic value of more than $187,000.00. The duties evaded totaled $26,150.00. Had interest accrued on those duties from the date of the last violation (a method of accounting most favorable to the Defendants), *see Ven-Fuel*, 758 F.2d at 764, the total amount would be much greater. The violation at issue is not an isolated occurrence, but presents a pattern of gross disregard for and evasion of the Customs laws of the United States. This factor offers nothing which would mitigate the penalty to be imposed. Rather, it supports a significant penalty.

3

PRACTICAL EFFECT OF THE IMPOSITION OF THE PENALTY

A

DEFENDANTS' ABILITY TO PAY

The extent of Defendants' ability to pay is a mitigating factor for the Court to consider. At trial, Defendants entered into evidence Defendants' tax returns and unaudited financial statements. Defendants' Exs. B, C, D and E. Defendants argue that based on this record evidence, "it is clear that Mr. Nyakas does not have the ability to pay a penalty even remotely approaching the domestic value amount which the government is seeking." Defendant's Brief at 8 (arguing that the domestic value of the disputed entries is twenty-nine times as large as Nyakas' total income in 1997 and more than twice as great as Subco's gross profits in 1997).

While the Court is mindful of the fact that the maximum penalty in this case is not insignificant, it is unable to accept Defendants' proffered evidence as accurate. First, the financial statements are unaudited and the Court has been presented with no evidence to verify their accuracy. Second, Defendants failed to provide any evidence, such as expert witness testimony (by, *e.g.*, an accountant qualified to analyze these foreign financial documents), to assist the Court in interpreting this evidence. These foreign tax returns may or may not be based on laws and regulations similar to the Internal Revenue Code of the United States.

Finally, as Plaintiff effectively demonstrates, some of the non-cash expenses listed in Defendants' financial documents, such as depreciation and a bad debt write-off, do not affect ongoing cash flow since these expenses have already been paid. Without expert testimony to explain these discrepancies, the Court is constrained to discount the weight given to Defendants' proffered financial evidence.

The Court has not completely disregarded the contents of the financial statements. Instead, the lack of expert testimony to interpret these documents has substantially limited the weight the Court assigned to this evidence and it weighed only minimally in Defendants' favor.

B

THE EFFECT OF THE PENALTY ON DEFENDANTS' ABILITY TO CONTINUE IN BUSINESS

Similarly, Defendants' assertion that a large penalty would cause their business to fail is based on unaudited financial statements, and is unsupported by any expert testimony. Once again, the Court is simply unable to give great weight to this evidence as credible or as a substantial mitigating factor on behalf of Defendants.

C

WHETHER THE PENALTY TO BE IMPOSED SHOCKS THE CONSCIENCE OF THE COURT

The Court does not find any sum within the statutory penalty range in this case to be shocking to the conscience. In assessing this factor, the Court has considered the apparently high proportion of the Defendants' business that has derived from importation of goods into the United States, coupled with the Defendants' flagrant disregard of the duties that are necessarily attendant to Defendants' choice of this market. Since Defendants' business relied substantially upon United States markets, a greater proportion of their assets may fairly be called upon as penalty for violations of United States law.

4

BENEFIT GAINED BY DEFENDANTS

Another factor is whether Defendants benefitted from their violations. Defendants concede that they benefitted economically from the savings of customs duties in the amount of $26,150.00, and the Court has weighed that factor in considering the appropriate penalty.

Plaintiff argues that "one of the reasons defendants were able to attract business in the United States was because they gained an unfair price advantage by circumventing payment of proper Customs duties." Plaintiff's Response at 15. While the Court does not disagree that Defendants probably made some use out of the money they saved, there is no evidence in the record supporting Plaintiff's assertion, and the Court has, accordingly, disregarded it.

C

WHILE PUBLIC POLICY CONCERNS DO NOT WEIGH HEAVILY IN THIS ANALYSIS, TO THE EXTENT THEY ARE CONSIDERED THEY WEIGH AGAINST DEFENDANTS

As detailed above, § 1592 is concerned more with deterrence than with compensation. Accordingly, the Court accords less weight to those factors which revolve around compensation of the harm resulting from

violations of the Customs laws. Those factors—the degree of harm to the public and the vindication of agency authority—do not, however, favor the Defendants.

1

THE DEGREE OF HARM TO THE PUBLIC

Courts may also look to the degree of harm to the public in calculating the penalty amount. Defendants argue that the degree of harm to the public was slight, claiming that "it cannot be said that the defendants substantially harmed the public by depriving the public fisc of $26,150.00." Defendants' Brief at 7. However, the amount of harm suffered by the Government is not limited to the dollar value of duties lost. *Snuggles*, 937 F. Supp. at 927 ("[T]he purpose of this penalty is not just to replace lost levies, but to remedy a wrong."). *Cf. United States v. Alcatex, Inc.*, 328 F. Supp. 129, 132 (S.D.N.Y. 1971) ("It is understandable and by no means unjust, for Congress to decide that when lawbreakers are caught they should help defray the enforcement expenses * * *.). The Government has also expended significant resources in the investigation of Defendants' violations and the enforcement of the Customs laws against Defendants.

2

THE VALUE OF VINDICATING AGENCY AUTHORITY

In this case, it is clear that the harm suffered by the Government and the public interest in vindicating agency authority weigh heavily in favor of the Government. Apart from the real and quantifiable expense incurred by Customs in investigating and prosecuting these violations, (*e.g.* the number of hours spent investigating this action) it is vital that the penalties imposed deter future lawbreakers from considering such actions to ensure the submission of true and accurate statements to Customs so that the agency may carry out its functions.

Defendants argue that the value of vindicating agency authority and the gravity of the violation weigh in favor of a mitigated penalty, as the Government "has already assessed criminal fines and restitution that more than offset the duties that were lost." Defendants' Brief at 9. Defendants further assert that their violation could not be considered a grave offense. Defendants' arguments, however, are misplaced. Simply because the Government has obtained criminal fines and restitution does not mean that deterrence goals have necessarily been met. In fact, if this were the case, the civil penalty statutes would be redundant. In addition, the penalty must be high enough to deter others from committing these customs violations. *Cf. United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 806 (M.D.Pa. 1996) ("[T]o serve the function of punishment and general deterrence, the court must bear in mind that if the regulated community perceives that violations of the law are treated lightly, the government's regulatory program is subverted.") (internal quotations omitted). Apart from any criminal sanc-

tion, while the penalty should be within fair proportion to the gravity of the offense, it must be high enough to achieve the goal of deterrence.

D

DEFENDANTS' ARGUMENTS UNDER THE FIFTH AND EIGHTH AMENDMENTS ARE UNSUPPORTED BY THE LAW

Defendant Andras H. also argues that since he was involved in only one violation, any penalty assessed against him should be limited. The Court has already addressed this issue at trial, finding that the penalty assessed against Andras H. should be imposed jointly and severally as to all the Defendants for Entries 1–25 of Exhibit A and Entries 1–24 of Exhibit B. Tr. at 7–11. All Defendants will be jointly and severally liable for the judgment awarded herein.

Defendants argue that the maximum penalty requested by Plaintiff runs afoul the Fifth Amendment's ban on double jeopardy and the Eighth Amendment's ban on excessive fines. Defendants assert that the civil penalty imposed must be limited to the actual damages suffered by the Government. Defendants' Brief at 13, 16. These arguments have little substance.

1

DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

Defendants cite at length to *United States v. Halper*, 490 U.S. 435 (1989), for the proposition that "a civil penalty imposed on a defendant who was previously assessed a criminal penalty, [sic] could be sufficiently disproportionate to the violation alleged as to constitute a second punishment in violation of the double jeopardy clause." Defendants' Brief at 12. In 1997, however, the Supreme Court in *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488 (1997), overruled the holding in *Halper* and decided to return to the analysis enunciated in *United States v. Ward*, 448 U.S. 242, 248–249 (1980). *Id.*, 118 S. Ct. at 491, 494 ("We believe that Halper's deviation from longstanding double jeopardy principles was ill considered."). The Court in *Hudson* explained that the Double Jeopardy Clause protects only against the imposition of multiple criminal punishments for the same offense. 118 S. Ct. at 493. The analysis used in *Halper* failed to first determine "whether the successive punishment at issue is a 'criminal' punishment. Instead, it focused on whether the sanction, regardless of whether it was civil or criminal, was so grossly disproportionate to the harm caused as to constitute 'punishment.'" *Id.*, 118 S. Ct. at 494.

The correct analysis is first to determine whether the penalty at issue is civil in nature. The second step is to discern whether the penalties are "'so punitive in form and effect as to render them criminal despite Congress' intent to the contrary.'" *Id.*, 118 S. Ct. at 495 (citation omitted).

Applying these traditional double jeopardy principles to the case at bar, it is clear that no amount of penalty under § 1592, including and up to the maximum allowable amount, would violate the Double Jeopardy Clause. First, Congress intended the penalties awarded for violations of

19 U.S.C. § 1592 to be civil in nature. 28 U.S.C. §1582, which authorizes the imposition of monetary penalties for violations of § 1592, expressly provides that such penalties are civil.[16] *See id.* Moreover, as noted by Plaintiff, the burdens of proof enumerated by Congress in establishing liability do not rise to those required in criminal cases, *i.e.* beyond a reasonable doubt.

Turning to the second prong of the analysis, there is no evidence that these monetary penalties are so punitive in form as to render them criminal in nature despite the clear civil context of the statute. First, these penalties to not involve an "'affirmative disability or restraint,' as that term is normally understood." *Hudson*, 118 S. Ct. at 496. Second, the penalties do not come into play only after a finding of scienter. *See United States v. Hitachi America, Ltd.*, 964 F. Supp. 344, 371 (CIT 1997) (finding intent to defraud not a necessary element). Third, the fact that the monetary penalties at issue may also form the basis of a criminal action and may act as a future deterrent are not sufficient "to render a sanction criminal." *Hudson*, 118 S.Ct. at 496.

In any event, to the extent that Defendants argue that any civil penalties imposed would violate the Double Jeopardy Clause, this Court has already addressed and squarely rejected that argument in *United States v. Complex Machine Works Co.*, 937 F. Supp. 943, 945 (CIT 1996), in the context of Defendants' motion to dismiss. Therefore, the law of the case doctrine prohibits this Court's reconsideration of the issue. *See Union Camp Corp. v. United States*, 963 F. Supp. 1212, 1213 (CIT 1997).

Defendants imply that the Court's earlier rejection of this argument was premature. Defendants point to three cases cited in the Court's earlier decision which, according to Defendants, "found that dismissal of the case based on a violation of the double jeopardy clause was inappropriate because the amount of civil penalty had yet [sic] been determined by the Court." Defendants' Brief at 17. Two of the cases discussed by Defendants, *United States v. Ziegler Bolt and Parts Co.*, 19 CIT 13, 1995 WL 13448 (1995), and *United States v. Valley Steel Prods. Co.*, 14 CIT 14, 729 F. Supp. 1356 (1990), never raised the inappropriateness of deciding this issue in relation to the Double Jeopardy Clause, although the courts did discuss this issue with reference to the Eighth Amendment. *See Ziegler*, 1995 WL 13448 at *9 ("This Court will not act on an argument sounding in the Eighth Amendment before a penalty is even assessed."). Similarly, in *United States v. Dantzler Lumber & Export Co.*, 16 CIT 1050, 810 F. Supp. 1277 (1992), the court rejected double jeopardy arguments raised by the defendants on their motion to dismiss. The court explained, as an apparent appeasement to the defendants, that the actual amount of penalties would be determined only at the end of a "full and fair exposition of the transactions challenged." *Dantzler Lumber*, 16 CIT at 1057, 810 F. Supp. at 1284.

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[16] 18 U.S.C. § 1582 provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—

(1) to recover a civil penalty under section 592 * * * of the Tariff Act of 1930 * * *.

Defendants' assertion that the penalty amount should not exceed the loss of revenue suffered by the Government would flatly contradict the statute's express provision for a penalty up to the domestic value of the merchandise. 19 U.S.C. § 1592 (c).

2

EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

Defendants also claim that a penalty at the maximum end of the authorized range violates the Excessive Fines Clause of the Eighth Amendment. This Court declines to address this argument, in view of the fact that it has not imposed the maximum penalty sought by Plaintiff. Indeed, even if the maximum penalty had been awarded, since the maximum amount "falls within the statutory limit * * * the Court cannot declare that, as a matter of law, it is excessive." *United States v. Valley Steel Products Co.*, 15 CIT 268, 271, 765 F. Supp. 752, 754 (1991).

CONCLUSION

After careful consideration of the evidence presented at trial, the Court has determined that the penalty awarded to the government must be a substantial one taking into account Defendants' lack of a good faith effort to comply, the duration of their violations, and the degree of harm to the United States Customs Service as a result of Defendants' violations. However, the Court is also mindful that while Defendants' financial statements were less than ideal, they reflect some evidence of financial limitations.

The Court has available to it a penalty range stretching from zero to $686,000. In the normal course, because the Defendants' character, the seriousness of their offense and the public policy concerns previously discussed weigh so heavily against them, the reasoning process here enunciated would lead to the maximum penalty. The Court has, however, taken into account the very limited evidence provided by Defendants regarding their ability to pay and, given that limited evidence, has reduced the penalty here imposed to a figure which it believes is still sufficient to reflect the substantially heavier weight of factors against Defendants.

Based on the foregoing analysis and conclusions, the Court determines that $400,000 represents a just penalty under all the facts and circumstances in this case. The Court accordingly grants judgment for Plaintiff and assesses a civil penalty in the amount of $400,000, plus interest from the date of judgment.

(Slip Op. 99–133)

POWER-ONE INC. AND PODER UNO DE MEXICO S.A. DE C.V., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 97–08–01340

[Defendant's Motion To Dismiss for lack of jurisdiction and/or failure to state a claim upon which relief could be granted is granted.]

(Decided December 14, 1999)

S.K. Ross & Assoc., P.C., (Susan Kohn Ross and Melvin L. Chung), for Plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(John J. Mahon); Chi S. Choy*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for Defendant.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* This matter is before the Court on the Government's Motion To Dismiss for lack of jurisdiction and/or failure to state a claim upon which relief could be granted. This action arises from the denial of a post-entry North American Free Trade Agreement ("NAFTA") claim. Compl. at para. 1; Answer at para. 1. Plaintiffs, Power-One Inc. ("Power-One") and Poder Uno de Mexico ("Poder Uno"), claim that this Court has jurisdiction over this matter under 28 U.S.C. §1581(a) and/or (i)(1) and/or (4). Compl. at para. 2. Plaintiffs assert that jurisdiction under §1581(a) attaches because the post-entry claim was treated by the United States Customs Service ("Customs") as a protest, despite the requirements of 19 C.F.R. § 174.12(e)(2)[1] and 19 U.S.C. §1514(a)[2] and (c)(2)(A)[3] and (E), and that therefore it became a protest in Customs' hands.[4] Plaintiffs' Opposition to Defendant's Motion to Dismiss ("Plaintiffs' Opposition") at 10–11. Alternatively, Plaintiffs claim this action arises from the denial of a protest, arguing that the same post-entry NAFTA claim actually was a protest. Compl. at para. 1. Plaintiffs further allege that jurisdiction under §1581(i) attached because the denial of the post-entry claim did not comply with the regulatory requirements of 19 C.F.R. § 181.75[5] and §181.76.[6] Compl. at paras. 1, 4, 5.

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1 19 C.F.R. § 174.12(e) (1999) governs the time period for filing a protest. 19 C.F.R. §174.12(e)(2) provides that a timely protest must be made within 90 days after "the date of written notice of a denial of a claim filed under [19 U.S.C. §1520(d)]."

2 19 U.S.C. §1514(a) (1994) lists, *inter alia*, which decisions of the Customs Service are deemed final unless a protest is filed or a civil action contesting the denial of a protest is filed in this Court.

3 19 U.S.C. §1514(c)(2)(A) (1994) sets forth that the importers or consignees shown on the entry papers or their sureties, may file a protest with respect to merchandise which is the subject of a decision specified in 19 U.S.C. §1514(a).

4 19 U.S.C. §1514(c)(2)(E) (1994) provides that any exporter or producer of merchandise subject to a determination of origin under 19 U.S.C. § 3332 may file a protest if the exporter or producer completed and signed a NAFTA Certificate of Origin covering the merchandise.

5 19 C.F.R. §181.75 (1999) governs the issuance of an origin determination.

6 19 C.F.R. §181.76 (1999) governs the application of origin determinations.

Defendant argues that this action should be dismissed because the Court lacks subject matter jurisdiction. Defendant argues that the Court lacks jurisdiction under 28 U.S.C. §1581(a) because of Plaintiffs' failure to file timely 19 U.S.C. §1514 protests regarding the negative origin determinations, the denial of Plaintiffs' 19 U.S.C. §1520(d) petition for refund of duty under NAFTA, and the liquidation with increased duties of eleven entries liquidated subsequent to the filing of Plaintiffs' §1520(d) petition. *See* Defendant's Memorandum in Support of Defendant's Motion to Dismiss for Lack of Jurisdiction and/or Failure to State a Claim Upon Which Relief Could Be Granted ("Defendant's Memorandum") at 8–16, 17. Defendant also argues that the Court lacks jurisdiction under 28 U.S.C. §1581(i) because an adequate remedy existed under 28 U.S.C. §1581(a). *Id.* at 18–20.

For the reasons set forth below, Defendant's Motion To Dismiss is granted.

II

BACKGROUND

In 1994, Poder Uno produced and shipped wire harnesses, transformers and power supplies to Power-One. Compl. para. 8, Answer at para. 8. In that year, Power-One, the importer of record, entered the 315 entries which are the subject of the post-entry NAFTA claim. *See* Defendant's Response to Court's Order of July 26, 1999.[7] None of the goods received preferential treatment under NAFTA because no NAFTA claim was made at the time of entry. Defendant's Memorandum at 1; Compl. at para. 8; Answer at para. 8. The wire harnesses were entered under HTSUS tariff item 8544.41.00.00 at a duty rate of 5.3% *ad valorem*. Compl. at para. 8; Answer at para. 8. The transformers were entered under tariff item 8504.31.40.00 at a duty rate of 5% *ad valorem*. *Id.* The power supplies were entered under tariff item 8504.40.80 at a duty rate of 3% *ad valorem*. *Id.*

On December 20, 1994, Power-One filed a post-entry NAFTA claim for the 1994 entries pursuant to the provisions of 19 U.S.C. §1520(d), seeking duty-free treatment for its wire harnesses, transformers and power supplies. Compl. at para. 9, Plaintiffs' Opposition, Exh. 1–1, Letter from Sara Gradilla of Power One to District Director of Nogales Customs of 12/20/94; Answer at para. 9.

On or about December 12 and 13, 1995, Customs, as part of its processing of the NAFTA claim, conducted a NAFTA verification audit at Poder Uno's facilities in Mexico to verify the origin of the goods at issue. Compl. at para. 10; Answer at para. 10; Defendant's Memorandum, Exh. B., Letter from District Director Rudy Cole of Nogales Customs to Poder Uno of 11/9/95. On December 19, 1995, a request for information was sent to Poder Uno seeking more documents to verify the NAFTA

[7] Although the dispositive motions indicate that 335 entries are at issue, Plaintiffs' Opposition at 3; Defendant's Memorandum at 1, Defendant submitted to the Court on August 3, 1999 the declaration of Ms. Choy which states that only 315 entries are at issue. Plaintiffs filed a subsequent declaration of Ms. Ross stating that only 314 entries were at issue. The specific number of entries is of no consequence in this decision.

claim. Defendant's Memorandum at 2 and Exh. D, Request for Information.

On January 18, 1996, Customs advised Poder Uno that there had been no response to Customs' requests for specific documentation and that failure to respond within 20 days of the date of the letter would result in the issuance of a "Negative Origin Determination," meaning that the NAFTA claim would be denied. Defendant's Memorandum at 2–3 and Exh. E, Letter from Import Specialist Jorge Salazar to Poder Uno of 1/18/96. When the requested documentation was not received, Customs issued a written determination on February 20, 1996 that the wire harnesses did not qualify as originating goods under NAFTA. Defendant's Memorandum at 3, 10 and Exh. F, Notice of Action. On November 21, 1996, Customs issued a written determination to the same effect in regard to the transformers and power supplies. Defendant's Memorandum at 3 and Exh. G.

On February 18, 1997, Customs issued a formal Notice of Action denying the Plaintiffs' §1520(d) petition because the goods "do not qualify as originating under the terms of NAFTA." Compl. para. 11 and Exh. 1–1; Answer at para. 11.

III

Discussion

A

The Court Lacks Jurisdiction Over This Matter Under 28 U.S.C. §1581(a) Because Plaintiffs Failed to File a Protest Against the Negative Origin Determinations Issued by Commerce and the Denial of Their §1520(d) Petition Pursuant to 19 U.S.C. §1514.

Pursuant to 28 U.S.C. §1581(a) (1994), this Court

> shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.[8]

Defendant argues that this Court lacks jurisdiction over this matter under 28 U.S.C. §1581(a) because no timely §1514 protest was filed against either the initial negative origin determinations or the subsequent denial of Power One's §1520(d) Petition.[9]

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[8] Section 515 of the Tariff Act governs the review of protests filed under 19 U.S.C. §1514 (1994), and is codified at 19 U.S.C. §1515 (1994).

[9] The Court construes this portion of Defendant's motion to dismiss as a USCIT R. 12(b)(1) motion to dismiss for lack of jurisdiction over the subject matter. In deciding such a motion, the Court looks to whether the moving party challenges the sufficiency of the pleadings or the factual basis underlying the pleadings. In the first instance, the Court must accept as true all facts alleged in the non-moving party's pleadings. In the second instance, the Court accepts as true only those facts which are uncontroverted. All other facts are subject to fact-finding by the Court. *Cedars-Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993).

Here, Defendant does not attack the sufficiency of the allegations in Plaintiffs' pleadings, but instead asserts Plaintiffs' action is barred because Plaintiffs failed to exhaust their administrative remedies. Answer at para. 21. Thus, Defendant challenges the actual existence of subject matter jurisdiction. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1350 (2d ed. 1990). Therefore, the allegations in Plaintiffs' Complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the USCIT R. 12(b)(1) portions of this Motion To Dismiss. All other facts underlying the controverted jurisdictional allegations are in dispute and are subject to fact-finding by this Court.

Protests can only be filed in regard to final decisions of Customs. Section 1514(a) states what decisions are final. The Government argues that denial of the post-entry NAFTA refund claim (§1520(d) petition)[10] is a final Customs decision as to "classification, rate, and amount of duties chargeable," as listed in §1514(a)(2). Therefore, that petition denial is a protestable decision under §1514(a). This means that a §1514 protest, and a denial of that protest under §1515, must occur prior to the filing of suit in order for this Court to have jurisdiction under §1581(a).[11]

1

CUSTOMS' TREATMENT OF PLAINTIFFS' PETITION DID NOT MAKE IT A PROTEST.

Plaintiffs argue that this Court has jurisdiction under 28 U.S.C. §1581(a) because Customs considered their NAFTA claim to be a protest, so therefore a protest was indeed filed and denied. Plaintiffs' Opposition at 6 and 10–12. Plaintiffs maintain that they did not file a protest. Transcript of Oral Argument at 22–23; Plaintiffs' Opposition Exh. 1–1. However, Plaintiffs argue that the contemporaneous written

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[10] Section 1520(d) permits the reliquidation of an entry to refund any excess duties paid on goods qualifying under the rules of origin set out in 19 U.S.C. § 3332 for which no claim for preferential tariff treatment was made at the time of importation, if the importer, within one year after the date of importation, files a claim, notwithstanding the fact that a valid protest was not filed.

[11] At oral argument, the parties argued whether §1520(d) petition denials were final, and therefore protestable, under §1514. The wording of §1514(a) is somewhat unclear on this point. This lack of clarity leads to confusion regarding jurisdiction under §1581(a). If the denials are not protestable, they cannot come to this Court under §1581(a).

A cursory brief reading of §1514 might indicate that a §1520(d) petition denial is not a protestable final decision of Customs. If so, such denials could not be reviewed here under §1581(a), because under that section, only Customs decisions which have been protested, and those protests denied may be reviewed by this Court. Under this line of reasoning, §1520(d) petitions could only be reviewed under the residual jurisdiction clause §1581(i).

The confusion arises from the first clause of §1514(a), which states that, "Except as provided in * * * section 1520 [and other sections] of this title" Customs decisions in a list of areas are "final and conclusive." The finality of the decision gives rise to its protestability under §1514(c). At first glance it may appear that denial of petitions filed under §1520(d) are not final and conclusive, and therefore not protestable. If they cannot be and are not protested, then this Court cannot entertain claims based upon the denial of the petitions under §1581(a).

Some case law that would appear to support this reading. *Dornier Medical Systems, Inc. v. United States*, 14 CIT 686, 747 F. Supp. 753 (1990), said that §1520 is excluded from §1514(a). In *Dornier*, the Plaintiff sued for interest on excess duties paid under §1520(d), which then dealt with refunds and errors. Plaintiff had not filed a §1514 protest. The Government argued a protest had to be filed before suit was commenced. The Court held that the suit was not barred. It relied on the fact that the decision not to pay interest had not been made until after the underlying administrative process was complete, so a §1514 protest would have been inappropriate since it was not part of the administrative decision. As an alternative basis for decision, the Court stated that §1520 was excluded from §1514(a), so the decision was not protestable. If correct, that *Dornier* dicta would have created absurd results.

The confusion dissipates when the consequences of such reasoning are examined. If the opening clause of §1514(a) excludes from finality, and therefore protestability, Customs decisions made under §1520, then it also excludes decisions made under the other sections listed in that opening clause. Those sections are 1501 (voluntary reliquidations), 1516 (petitions by domestic interested parties), and, formerly, 1521 (reliquidations on account of fraud). That last section, 1521, has been repealed in favor of using §1592 for the purposes previously served by §1521. Section 1592 does not appear in the current §1514(a).

This Court has clearly not followed *Dornier*'s logic regarding these other sections in the past. For instance, many cases decided by this Court make clear that voluntary reliquidations by Customs under §1501 can be challenged under §1581(a), so long as the plaintiff has filed a separate and specific protest of the reliquidation (as opposed to the initial classification or liquidation), and further cases allow for review of protest denials under the other three sections. *See, e.g. Mitsubishi Elec. Am. v. United States*, 18 CIT 929, 865 F.Supp. 877 (1994); *Philip Morris U.S.A. v. United States*, 13 CIT 556, 716 F.Supp. 1479 (1989), *aff'd in part, rev'd in part*, 907 F.2d 158 (Fed. Cir. 1990); *see also Sweet Briar, Inc. v. United States*, 73 Cust.Ct. 93 (1974) (challenging a reliquidation under §1521 for suspected fraud); *United States v. Jac Natori Co., Ltd.*, 17 CIT 348, 354–55, 821 F.Supp. 1514, 1520 (1993) (dicta indicating that reliquidations under §1501, §1516, §1520, and §1521 are protestable events).

It would be absurd if none of those decisions was ever final. *See Madden Machine Co., Inc. v. United States*, 499 F.2d 1294, 1297 (Fed. Cir. 1974). Furthermore, these "never final" decisions would then all fall to §1581(i) jurisdiction in this Court. Sections 1501, 1516, and 1520 govern everyday Customs decisions. The residual jurisdiction clause is intended to catch cases falling through the cracks of the rest of the jurisdictional section; not as a basket for cases stemming from regularly-made Customs decisions. That result would be nonsense.

To read the statute as excluding §1520(d) petition denials from protestability, and therefore from §1581(a) jurisdiction, would be to overrule years of decisions from this Court which have not been questioned, and would lead to the odd result of a large set of major cases falling only under this Court's residual jurisdiction. Any such reading is erroneous.

evidence clearly shows that Nogales Customs considered Power One's NAFTA claim to be a protest because (1) Customs assigned a protest number to the claim and (2) Customs' Automated Commercial System database states that the entries covered by the claim were in the protest denial stage.[12] Plaintiffs' Opposition at 10. Plaintiffs explain that Customs' denial of their NAFTA refund claim, found in the document attached as Exhibit H to Defendant's Memorandum, constitutes the requisite protest denial because Customs considered the petition to be a protest. Plaintiffs' Opposition at 11.

Plaintiffs provide no legal authority to support this argument.

Defendant addresses Plaintiffs arguments with regard to the protest number and Customs' Automated Commercial System database. Defendant's Reply to plaintiffs' Opposition to Defendant's Motion to Dismiss ("Reply") at 3–6. Defendant explains that Customs electronic records label both §1514 claims and §1520 claims as "protests." *Id.* at 4. However, by looking at the tracking number and the type of document filed, it is clear which "protests" are actually §1514 protests, and which are §1520(d) petitions. The indicators of the different types of claims filed are on reports available through the automated system. *Id.*

Defendant's explanation demonstrates that Customs treated Plaintiffs' claim as a §1520(d) petition and not a protest filed pursuant to §1514. This is also evidenced by the fact that all the entries were reviewed for NAFTA eligibility. *See* Defendant's Memorandum, Exhibit H, Notice of Action. Had Customs truly considered the §1520(d) claims to be §1514 protests, it would not have reviewed the documents on the merits of the NAFTA eligibility. It would have been a non-protestable matter at that point, because no Customs decision had yet been made to be protested. Since Customs did reach the merits of NAFTA eligibility, it clearly treated the claim as a §1520(d) petition and not as a protest. Therefore, Plaintiffs have neither the legal nor factual basis for the argument that Customs' actions turned a post-entry NAFTA claim into a protest.

2

PLAINTIFFS' ALTERNATIVE ARGUMENT THAT THE PETITION WAS SUFFICIENT TO BE A PROTEST UNDER THE OBJECTIVE STANDARD FOR A PROTEST FAILS BECAUSE PLAINTIFFS MADE IT CLEAR TO CUSTOMS THAT THEY WERE NOT FILING A PROTEST.

Plaintiffs argue in the alternative that their submission to Customs qualifies as a §1514 protest under the objective standard set forth in *Mattel, Inc. v. United States*, 377 F. Supp. 955, 963 (Cust. Ct. 1974). Therefore the denial of their submission constituted a denial of a protest, and jurisdiction is appropriate under §1581(a). Plaintiff's Opposition at 13.

[12] Plaintiffs explained that "Power One's surety, Intercargo, obtained that data directly from Customs' Automated Commercial System which clearly indicates Customs considered Power One's entries as having been protested, please see the notation 'PROTEST STATUS: DENIED' which appears directly beneath the entry numbers." Plaintiffs' Opposition at 10.

The test for determining if a submission is a protest is objective and independent of a Customs official's subjective reaction to it. *See Mattel*, 337 F.Supp. at 963:

> "[H]owever cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of section 514 if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought."

Id. at 960.

Here, the letter submitted by Power One to Customs is referenced as "Post Importation Duty Refund Claim C.F.R. 181.31." Plaintiffs' Opposition, Exh. 1–1. Furthermore, the letter states that the individual submitting the letter on behalf of Power One was "respectfully requesting under C.F.R. 181.31 the Post Importation Duty Refund Claim for the list of Entries attached." *Id.* Additionally, the letter states that:

> As per C.F.R. 181.32, we have not provided copies of the Entry summaries to any other person not related to Power-One, Inc., nor have we filed any claim for refund, waiver or reduction of duties relating to the goods within the meaning of Article 303 of the NAFTA, *nor have we filed a protest* or petition or request for reliquidation.

Id. (emphasis added). Plaintiffs' counsel, at oral argument, even went so far as to state that Plaintiffs maintain their position that they did not file a protest. Transcript of oral argument at 22–23.

Furthermore, had this document been a protest, it would have been premature. As stated above, a §1520(d) petition must come before a protest. Prior to denial of a §1520(d) claim, Customs has made no decision which can be protested.

Given that (1) the expressed intent of Power One was to file a post-entry NAFTA claim pursuant to 19 C.F.R. §§ 181.31 and 181.32, both of which address the right to and filing procedure for a post-importation duty refund claim available pursuant to 19 U.S.C. §1520(d); (2) that this expressed intent negates the document's ability to apprise Customs of an intent to file a protest; and (3) that if this claim was a protest it would have been premature, the Court concludes that this submission was a §1520(d) petition and not a §1514 protest. Therefore, Plaintiffs' argument fails.

B

THE COURT LACKS JURISDICTION OVER THIS MATTER UNDER 28 U.S.C. §1581(i) BECAUSE JURISDICTION UNDER ANOTHER SUBSECTION OF §1581 WAS AVAILABLE.

Section 1581(i) enables the Court to hear a case when other means of obtaining judicial review are manifestly inadequate. *Star Sales & Distrib. Corp. v. United States*, 10 CIT 709, 711, 663 F. Supp. 1127, 1129 (1986). "'[S]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of §1581 is or could have been available.'" *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988) (quoting Miller and Co. v. United States, 824 F.2d 961, 963 (Fed. Cir. 1988).

Here, Plaintiffs could have invoked the Court's jurisdiction under 28 U.S.C. §1581(a) if it had exhausted its administrative remedies by protesting the Customs decisions, as set forth in the previous section. Accordingly, the Court finds that jurisdiction was not properly invoked by Plaintiffs under 28 U.S.C. §1581(i).

C

PLAINTIFFS' CLAIM THAT CUSTOMS FAILED TO FOLLOW ADMINISTRATIVE PROCEDURES IN DENYING THE §1520(d) PETITION DOES NOT CHANGE THE RESULT THAT THE DENIAL MUST HAVE BEEN PROTESTED PRIOR TO COMING TO THIS COURT.

Plaintiffs argue that this Court has jurisdiction under 28 U.S.C. §1581(i) because Customs failed to properly administer and enforce the laws providing for revenue from imports and the administration and enforcement of the customs laws and regulations. Plaintiffs' Opposition at 16–17. Plaintiffs claim that Customs failed in this regard by improperly denying Power One's duty refund claim without meeting the requirements of 19 C.F.R. §§ 181.75 and 181.76. *Id.* at 16–17.

This argument would have been properly made in a §1514 protest of the denial of Plaintiffs' §1520(d) petition. It is in that proceeding that Customs' actions in denying the petition should first be scrutinized. This Court cannot now entertain that argument, because §1581(i) jurisdiction cannot attach, for the reasons set forth above.

If Plaintiffs had shown that pursuing the administrative remedies available to it, namely the §1514 protest, would have been futile, then this case might not be dismissed for failure to exhaust administrative remedies. *Rhone Poulenc S.A. v. United States*, 7 CIT 133, 135, 583 F.Supp. 607, 610 (1984); *Ogletree v. McNamara*, 449 F.2d 93, 99 (6th Cir. 1971). However, Plaintiffs made no such claim in this case. Furthermore, Customs has shown that further pursuance of administrative remedies would not have been futile in that Customs provided Plaintiffs with several notices and opportunities to submit additional documentation to support their claim.

Plaintiffs cannot avoid exhausting their administrative remedies prior to coming to this Court. Customs' denial of the §1520(d) petition was a protestable decision. Absent a showing of the futility of pursuing administrative remedies, the decision had to be protested before this Court could exercise jurisdiction over the claim.

D

THE PARTIES HAVE CONCEDED THAT THE PLAINTIFFS FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED AS TO THOSE ENTRIES WHICH WERE ENTERED AND LIQUIDATED DUTY FREE AS AMERICAN GOODS RETURNED.

The Government argues that Plaintiffs have failed to state a claim upon which relief can be granted in regard to the entries included in this case which were entered and liquidated duty free as American Goods Returned under HTSUS tariff item 9801.00.10. Plaintiffs did not op-

pose this point in their Opposition. At oral argument, Plaintiffs conceded that these entries, since they were duty free, were not properly at issue. Oral argument transcript at p. 24.

Therefore this portion of the Government's Motion to Dismiss is moot.

IV

CONCLUSION

This Court lacks subject matter jurisdiction to hear this case. No §1581(a) jurisdiction exists because the prerequisite of a protest denial has not been met. There is no jurisdiction under §1581(i) because there could have been jurisdiction under §1581(a), had the proper procedures for invoking that jurisdiction been followed.

Therefore, Defendant's Motion to Dismiss for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted is granted.

(Slip Op. 99–134)

RHP BEARINGS LTD., NSK BEARINGS EUROPE LTD. AND NSK CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Consolidated Court No. 97–02–00217

Plaintiffs, RHP Bearings Ltd., NSK Bearings Europe Ltd. and NSK Corporation (collectively, "RHP-NSK"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 62 Fed. Reg. 2081 (Jan. 15, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany: Amended Final Results of Antidumping Administrative Review*, 62 Fed. Reg. 2130 (Jan. 15, 1997), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, and Singapore; Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 14,391 (Mar. 26, 1997).

Specifically, RHP-NSK claims that Commerce erred in: (1) using aggregate data that encompasses all foreign like products under consideration for normal value for calculating constructed value ("CV") profit under 19 U.S.C. § 1677b(e)(2)(A) (1994); (2) including sample transactions that were not supported by consideration in RHP-NSK's United States sales database; and (3) excluding imputed inventory carrying costs in the constructed export price ("CEP") offset for RHP-NSK when Commerce matched CEP sales to CV.

Torrington responds that: (1) Commerce reasonably calculated profit for CV on the basis of the statutory preferred method of 19 U.S.C. § 1677b(e)(2)(A); (2) RHP-NSK failed to prove that the sample transactions in question were without consideration or, if a remand is ordered, Commerce should determine whether RHP-NSK's sample transactions are in fact without consideration; and (3) Commerce should not include imputed inventory car-

rying costs when comparing CEP sales to CV or, if a remand is ordered, any deduction of such costs should be capped not to exceed actual expenses.

Held: RHP-NSK's motion is denied in part and granted in part. The case is remanded to Commerce to: (1) exclude from RHP-NSK's United States sales database any sample transactions that were not supported by consideration and to adjust the dumping margins accordingly; and (2) include imputed inventory carrying costs in the calculation of CEP offset for RHP-NSK when matching CEP sales to CV.

[RHP-NSK's motion is denied in part and granted in part. Case remanded.]

(Dated December 16, 1999)

Lipstein, Jaffe & Lawson, L.L.P. (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis,* Assistant Director); of counsel: *Mark A. Barnett, Patrick V. Gallagher* and *David R. Mason,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, RHP Bearings Ltd., NSK Bearings Europe Ltd. and NSK Corporation (collectively, "RHP-NSK"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results"),* 62 Fed. Reg. 2081 (Jan. 15, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany: Amended Final Results of Antidumping Administrative Review,* 62 Fed. Reg. 2130 (Jan. 15, 1997), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, and Singapore; Amended Final Results of Antidumping Duty Administrative Reviews,* 62 Fed. Reg. 14,391 (Mar. 26, 1997).

Specifically, RHP-NSK claims that Commerce erred in: (1) using aggregate data that encompasses all foreign like products under consideration for normal value ("NV") for calculating constructed value ("CV") profit under 19 U.S.C. § 1677b(e)(2)(A) (1994); (2) including in RHP-NSK's United States sales database any sample transactions that were not supported by consideration; and (3) excluding imputed inventory carrying costs in the constructed export price ("CEP") offset for RHP-NSK when it matched CEP sales to CV.

Torrington responds that: (1) Commerce reasonably calculated profit for CV on the basis of the statutory preferred method of 19 U.S.C. § 1677b(e)(2)(A); (2) RHP-NSK failed to prove that the sample transactions in question were without consideration or, if a remand is ordered, Commerce should determine whether RHP-NSK's sample transactions are in fact without consideration; and (3) Commerce should not include

imputed inventory carrying costs when comparing CEP sales to CV or, if a remand is ordered, any deduction of such costs should be capped not to exceed actual expenses.

The Court will address each of these arguments in turn.

Background

This case concerns the sixth administrative review of the antidumping duty order on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported from the United Kingdom during the review period of May 1, 1994 through April 30, 1995.[1] Commerce published the preliminary results of the subject review on July 8, 1996. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Thailand and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Termination of Administrative Reviews, and Partial Termination of Administrative Reviews* ("*Preliminary Results*"), 61 Fed. Reg. 35,713. On January 15, 1997, Commerce published the *Finals Results* at issue here. *See* 62 Fed. Reg. at 2081.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

Standard of Review

The Court will uphold Commerce's final determination in an administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. Substantial Evidence Test

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers,*

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[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995) ("URAA"). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

Inc. v. NLRB, 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera*, 340 U.S. at 488)).

II. *Chevron* Two-Step Analysis

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' is the statute's text, giving it its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Flora Trade Council v. United States*, 23 CIT ___, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however") (citation omitted).

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. *Chevron*, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's. *See IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992); *see also Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States Dep't of Commerce*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). "In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." *Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT ___, ___, 15 F. Supp. 2d 807, 813 (1998)).

DISCUSSION

I. Calculation of Profit for Constructed Value

A. Statutory and Factual Background

An antidumping duty is imposed upon imported merchandise when (1) Commerce determines such merchandise is sold or likely to be sold in the United States at less than fair value ("LTFV," *i.e.*, at a price which is lower than the price at which the merchandise is sold in the country of exportation or to a third country), and (2) the International Trade Commission determines that domestic industry is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the subject merchandise or by reason of the LTFV sales or likelihood of LTFV sales of that merchandise for importation. *See* 19 U.S.C. § 1673 (1994). In calculating the antidumping duty, Commerce compares the price of the imported merchandise in the United States (*i.e.*, export price ("EP") or CEP)[2] to its NV. *See id.* The dumping margin is "the amount by which the [NV] exceeds the [EP] or [CEP] of the subject merchandise." 19 U.S.C. § 1677(35) (1994).

NV is the comparable price for a product like the imported merchandise when first sold (generally, to unaffiliated parties) "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i) (1994). Where home market sales of such foreign like product are not available or usable as a basis for determining NV, Commerce may measure dumping by comparing the EP or CEP to NV based on either: (1) sales in a third-country market, that is, sales of the foreign like product to a country other than the home market or the United States, *see* 19 U.S.C. § 1677b(a)(1)(B), (C); or (2) CV of the imported merchandise, *see* 19 U.S.C. § 1677b(a)(4),[3] which is calculated pursuant to 19 U.S.C. § 1677b(e) (1994).

Profit is a component in the calculation of CV.[4] *See* 19 U.S.C. § 1677b(e)(2)(A). Under current antidumping law, as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), the preferred method for determining profit for CV is to add to CV "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review * * * for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign

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[2] Typically, Commerce uses the export price when the foreign exporter sells directly to an unrelated United States purchaser. *See* 19 U.S.C. § 1677a(a) (1994). Commerce uses the constructed export price when the foreign exporter sells through a related party in the United States. *See id.* § 1677a(b).

[3] *See* Statement of Administrative Action ("SAA") accompanying the URAA, H.R. Doc. No. 103–316, at 839 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4175 (stating that "[c]onstructed value is used * * * for normal value where home market sales of the merchandise in question are either nonexistent, in inadequate numbers, or inappropriate to serve as a benchmark for a fair price, such as where sales are disregarded because they are sold at below-cost prices").

[4] *See* SAA at 839 ("Because constructed value serves as a proxy for a sales price, and because a fair sales price would recover [selling, general and administrative ("SG&A")] expenses and would include an element of profit, constructed value must include an amount for SG&A expenses and for profit.").

country[.]" 19 U.S.C. § 1677b(e)(2)(A). The Statement of Administrative Action[5] ("SAA") accompanying the URAA provides that Commerce may disregard sales that it considers to be outside the ordinary course of trade, that is, "Commerce may ignore sales that it disregards as a basis for normal value, such as those disregarded because they are made at below-cost prices." H.R. Doc. No. 103–316, at 839 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4175–76; *see* 19 U.S.C. § 1677(15) (1994); 19 U.S.C. § 1677b(b)(1) (1994).

In promulgating its amended regulation 19 C.F.R. § 351.405 to the URAA, which deals with calculating NV based on CV, Commerce determined that it would use aggregate figures of foreign like products to calculate CV profit under the preferred methodology of 19 U.S.C. § 1677b(e)(2)(A). *See Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 Fed. Reg. 7308, 7335 (Feb. 27, 1996) ("*Proposed Regulations*"). Commerce reasoned as follows:

> The Department's practice had been to use aggregate figures [for selling, general and administrative expenses ("SG&A") and profit]. Notably, section 773(e)(1)(B) [*i.e.*, 19 U.S.C. § 1677b(e)(1)(B)] of the pre-URAA statute provided for calculation of an amount for profit and SG&A "equal to that usually reflected in sales of merchandise of the *same general class or kind* as merchandise under consideration" (emphasis added). In comparison, section 77[3](e)(2)(A) [*i.e.*, 19 U.S.C. § 1677b(e)(2)(A)] of the amended Act provides for use of the actual amounts incurred and realized for profit and SG&A "in connection with the production and sale of a foreign like product." The use of "a" arguably could be interpreted to mean a particular model. The SAA, on the other hand, refers to actual amounts incurred, "in selling the particular merchandise in question (foreign like product)." SAA, at 839. This language supports a view that the use of "a" was not intended to overturn our prior practice of relying on aggregate figures for profit and SG&A. Moreover, if "a" were to be interpreted literally, the Department would have the discretion to pick and choose the sale of the foreign like product from which profit and SG&A would be taken. This clearly would undermine the predictability of the statute. Given these distinctions, the amended Act arguably provides for a narrower basis for the calculation of profit and SG&A than did the prior statute. Therefore, the Department intends to calculate profit and SG&A based on an average of the profits of foreign like products sold in the ordinary course of trade.

Id.

If the statutory preferred method cannot be followed under 19 U.S.C. § 1677b(e)(2)(A), "either because there are no home market sales of the

[5] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." SAA at 656. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.* (quoted in *Delverde, SrL v. United States*, 21 CIT ____, ____, 989 F. Supp. 218, 229–30 n.18 (1997)); *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

foreign like product or because all such sales are at below-cost prices," then Commerce may calculate CV profit using one of three alternative methods in § 1677b(e)(2)(B).[6] SAA at 840. The SAA provides that § 1677b(e)(2)(B) "does not establish a hierarchy or preference among these alternative methods." *Id.*

In this case, Commerce matched United States models to NV models according to the following methodology, in order of preference: (1) it first looked for an identical home market model; (2) if no identical match was found, it matched by family designation (*i.e.*, similar match); and (3) for those United States models for which no identical or similar match was found, the CV of the United States model was used as the basis for NV. *See NSK-RHP Bearings—Preliminary Results Analysis Memo—Antifriction Bearings from the U.K.—Sixth Administrative Review, 5/1/94–4/30/95*, A–412–801, Proprietary Doc. No. 12 (Fiche 71), at 2 (July 2, 1996).

Commerce calculated profit for CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A). *See Preliminary Results*, 61 Fed. Reg. at 35,718. In particular, Commerce calculated CV profit for each respondent by aggregating each respondent's profits for the foreign like products sold in the ordinary course of trade.

In the *Final Results*, respondents, including RHP-NSK,[7] argued that Commerce erred in applying 19 U.S.C. § 1677b(e)(2)(A) because this section requires Commerce first try to calculate CV profit for imported merchandise based on profit amounts on the sales of the imported merchandise's 'foreign like product,' which did not exist here when NV was based on CV. *See* 62 Fed. Reg. at 2113.

Specifically, respondents requested that Commerce apply the same definition of "foreign like product" used for home market price calculations to determine CV profit. In other words, respondents requested that if the foreign like product is an identical bearing, CV profit should be based on profit amounts for above-cost identical bearing matches, or alternatively, if there is no identical model, CV profit should be based on the profit amounts for above-cost bearing family matches. Where there are no home market sales of identical or family bearings, respondents asserted that under 19 U.S.C. § 1677b(e)(2)(A) there can be no profits on sales of the foreign like product in the home market in the ordinary course of trade. Respondents, therefore, argued that since there were no usable sales of "foreign like product" when Commerce used CV to calcu-

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[6] If actual data are not available with respect to the amounts described in 19 U.S.C. § 1677b(e)(2)(A) (1994), then § 1677b(e)(2)(B) provides one of the following three alternative methods for calculating amounts for (SG&A expenses and) profit for purposes of constructed value:

> (1) actual amounts incurred or realized by the same producer on home market sales of the same general category of products; (2) the weighted-average of actual amounts incurred or realized by other investigated companies on home market sales in the ordinary course of trade (*i.e.*, profitable sales) of the foreign like product; or (3) any other reasonable method, provided that the amount for profit does not exceed the profit normally realized by other companies on home market sales of the same general category of products (the so-called profit cap).

SAA at 840.

[7] Although the "Profit for Constructed Value" section of the *Final Results* refer only to arguments of "NSK," that is, NSK Corporation, *see* 62 Fed. Reg. at 2113, as abbreviated at 62 Fed. Reg. at 2085, the Court assumes that "NSK" collectively refers to RHP Bearings Ltd., NSK Bearings Europe Ltd. and NSK Corporation, as noted in plaintiffs' "General Issues Rebuttal Brief" at 1, received after the *Preliminary Results* by Commerce on Aug. 12, 1996.

late NV, the only option for Commerce was to calculate CV profit on the basis of one of the three alternatives in § 1677b(e)(2)(B). *See id.* Although the three alternative methods are not listed in order of preference, respondents claimed that there is a strong preference for using the first alternative CV profit calculation, that is, "the use of company-specific data regarding the same general category of merchandise." *Id.* (citing 19 U.S.C. § 1677b(e)(2)(B)(i)).

Commerce disagreed with respondents that it did "not have any 'foreign like products' for use in calculating CV profit" and, therefore, it rejected their suggested model-matching methodology for calculating CV profit under 19 U.S.C. § 1677b(e)(2)(A). *Id.* Consistent with its statutory interpretation and reasoning contained in the *Proposed Regulations* regarding application of § 1677b(e)(2)(A), Commerce found that:

> Respondents' definition of the term "foreign like product" is overly narrow with respect to its use in the CV-profit provisions. In applying the "preferred" method for calculating profit (as well as SG&A) under section 773(e)(2)(A) [*i.e.*, 19 U.S.C. § 1677b(e)(2)(A)], the use of aggregate data that encompasses all foreign like products under consideration for NV represents a reasonable interpretation of the statute and results in a practical measure of profit that we can apply consistently in each case. By contrast, an interpretation of section 773(e)(2)(A) that would result in a method based on varied groupings of foreign like products, each defined by a minimum set of matching criteria shared with a particular model of the subject merchandise, would add an additional layer of complexity and uncertainty to antidumping proceedings without generating more accurate results. It would also make the statutorily preferred CV-profit methodology inapplicable to most cases involving CV.

Id.

B. Contentions of the Parties

1. RHP-NSK's Contentions

RHP-NSK contends that Commerce defined "foreign like product" for purposes of the CV profit calculation in a manner contrary to the statutory definition of the term and well-established agency practice. *See* Pls.' Mem. Supp. Mot. J. Agency R. at 4. In particular, RHP-NSK asserts that 19 U.S.C. § 1677b(e)(2)(A) requires that Commerce first try to calculate CV profit for imported merchandise based on actual profit amounts incurred in the home market production and sale of "foreign like product," that is, model or family products, that match each bearing model sold in the United States. *See id.* at 6, 15.

RHP-NSK notes that 19 U.S.C. § 1677(16) (1994) defines "foreign like product" by establishing three distinct categories of products for model-matching purposes. *See id.* at 8. The first category of merchandise is identical merchandise, the next category is nonidentical merchandise made by the same producer in the same country and is similar in value to the merchandise under investigation, and the third category is merchandise made by the same producer in the same country and used for the same purposes as the merchandise under investigation. *See id.* RHP-

NSK asserts that once Commerce finds merchandise in one category, merchandise in the subsequent categories can never be considered foreign like product because § 1677(16) directs Commerce to determine foreign like product in the first of the listed categories. *See id.* § 1677(16); *see also Federal-Mogul Corp. v. United States*, 20 CIT ____, ____, 918 F. Supp. 386, 396 (1996); *Cemex, S.A. v. United States*, 133 F.3d 897, 903 (Fed. Cir. 1998) (noting same for pre-URAA § 1677(16)). RHP-NSK argues, therefore, that since the plain language of § 1677(16) clearly creates a descending hierarchy for selecting foreign like product, *Chevron* dictates that the Court, as well as Commerce, must give effect to the unambiguously expressed intent of Congress and, thus, the reasonableness of Commerce's interpretation of 19 U.S.C. § 1677b(e)(2)(A) is irrelevant. *See id.* at 8–10.

RHP-NSK also argues that Commerce erred in claiming that in this review it followed its past practice of using aggregate figures for calculating CV profit. *See* Pls.' Reply Mem. Supp. Mot. J. Agency R. at 4. RHP-NSK notes that prior to the URAA, the antidumping law required Commerce to base CV profit on "an amount for * * * profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration." *Id.* (quoting 19 U.S.C. § 1677b(e)(1)(B) (1988)). Citing several administrative reviews, RHP-NSK asserts that after the enactment of the URAA, Commerce continually rejected requests that it base CV profit on reported home market sales because the agency "did not consider these sales representative of the profit for the general class or kind of merchandise." *Id.* (citations omitted). RHP-NSK, therefore, argues that contrary to Commerce's claim, the agency in prior reviews repudiated the type of CV profit calculation performed in this review. *See id.*

RHP-NSK also maintains that the legislative history of the URAA confirms that Commerce should calculate CV profit on a model or family basis when using the preferred methodology under 19 U.S.C. § 1677b(e)(2)(A). *See* Pls.' Mem. Supp. Mot. J. Agency R. at 10. RHP-NSK notes that when Commerce revised its regulations to conform to the URAA, in particular 19 C.F.R. § 351.405, the agency specified it would use "an aggregate calculation that encompasses all foreign like products under consideration for normal value." *Antidumping Duties; Countervailing Duties; Final rule* ("*Final Regulations*"), 62 Fed. Reg. 27,296, 27,359 (May 19, 1997). RHP-NSK further notes that Commerce found this method for calculating CV profit as "consistent with the Department's method of computing SG&A and profit under the pre-URAA version of the statute, and, while the URAA revised certain aspects of the SG&A and profit calculation, we do not believe that Congress intended to change this particular aspect of our practice." *Id.* Nevertheless, RHP-NSK claims that contrary to Commerce's finding, the URAA legislative history makes clear that the current preferred methodology for calculating CV profit is not consistent with Commerce's pre-URAA methodology. *See* Pls.' Mem. Supp. Mot. J. Agency R. at 10. The URAA

legislative history, according to RHP-NSK, first recites the pre-URAA law, 19 U.S.C. § 1677b(e)(1)(B) (1988), with reference to profit amounts based on the same general class or kind as the merchandise under investigation, then announces that 19 U.S.C. § 1677b(e)(2)(A) (1994) "establishes *new* methods of calculating SG&A expenses and profits consistent with methods provided for in the [URAA]." *Id.* (quoting SAA at 839) (emphasis added). RHP-NSK specifically notes that the new § 1677b(e)(2)(A) "establishes as a general rule that Commerce will base amounts of SG&A expenses and profits only on amounts incurred and realized in connection with sales in the ordinary course of trade of the *particular* merchandise in question (foreign like product)." *Id.* at 10–11 (quoting SAA at 839) (emphasis added). RHP-NSK, therefore, argues that the URAA legislative history directly contradicts Commerce's position and demonstrates Congress' clear intent to alter the preferred basis on which Commerce calculates CV profit. *See id.* at 11.

RHP-NSK further notes that after taking into account changes in nomenclature of the URAA, the first alternative methodology for CV profit, 19 U.S.C. § 1677b(e)(2)(B)(i), is nearly identical to the pre-URAA CV profit methodology, 19 U.S.C. § 1677b(e)(1)(B), except that sales at issue do not have to be in the ordinary course of trade. *See id.* at 11. RHP-NSK also notes that the URAA legislative history provides that "[w]ith respect to alternative (1), this methodology is consistent with the existing practice of relying on a producer's sales of products in the same 'general class or kind of merchandise.'" *See id.* (quoting SAA at 840). RHP-NSK, therefore, maintains that if § 1677b(e)(1)(B) is meant to be consistent with Commerce's pre-URAA practice, then necessarily § 1677b(e)(2)(A) is meant to be different. *See id.*

In addition, contrary to Commerce's suggestion in the *Proposed Regulations* that "use of 'a' was not intended to overturn [the agency's] practice of relying on aggregate figures for profit and SG&A," RHP-NSK claims that the use of word "a" in the CV profit provision does not obliterate the explicit hierarchy for identifying "foreign like product" as established by 19 U.S.C. § 1677(16). *See id.* at 12. RHP-NSK argues that it makes no difference if the word "a" means "any," as in "any foreign like product," or "the," as in "the foreign like product," because the CV profit calculation is the same, that is, it must be based on a "foreign like product," not on an aggregate of products, some of which may qualify as foreign like product, but most would not. *See* Pls.' Reply Mem. Supp. Mot. J. Agency R. at 5.

RHP-NSK also asserts that if Commerce is correct that the term "foreign like product" permits it to use "an aggregate calculation [for CV profit] that encompasses all foreign like products under consideration for normal value," then it must also be the case that NV or cost of production ("COP") may be based on an aggregate price or cost, as appropriate, for all products under consideration for NV. Pls.' Mem. Supp. Mot. J. Agency R. at 14 (quoting 62 Fed. Reg. at 27,359). RHP-NSK appears to assert that such a conclusion is indisputably wrong because ex-

tending Commerce's definition of "foreign like product" to other key antidumping provisions would upend the entire legal framework of the antidumping statute. *See id.* at 13–14. RHP-NSK claims that it is equally indisputable that 19 U.S.C. § 1677b(e)(2)(A) does not permit Commerce to calculate CV profit based on the aggregate profit for all sales in the above-cost foreign sales database. *See id.* at 14–15.

NSK-RHP requests that the Court remand the *Final Results* to Commerce to calculate CV profit based on actual profit amounts incurred in the home market production and sale of model or family products that match each bearing model sold in the United States or, in the absence of such profit data, to use one of the alternative profit methodologies specified under 19 U.S.C. § 1677b(e)(2)(B). *See id.* at 15.

2. Commerce's Contentions

In response, Commerce asserts that it applied a reasonable interpretation of 19 U.S.C. § 1677b(e)(2)(A) and properly based CV profit for each respondent, including RHP-NSK, upon the actual profit data of that respondent. *See* Def.'s Partial Opp'n to Mot. J. Agency R. at 17. Although Commerce recognizes that 19 U.S.C. § 1677(16) establishes a descending hierarchy that articulates preferences for the type of foreign like product the agency must select for matching purposes, it, nevertheless, claims, in essence, that where the subject merchandise is complex, encompassing numerous characteristics for matching, the foreign like product typically embraces more that one of the § 1677(16) categories. *See id.* at 10. Commerce contends that the term "foreign like product" is not limited to the product which is "identical" (*i.e.*, "model-specific") or "like" (*i.e.*, "similar to") the subject merchandise, because if neither is available, merchandise of the same "general class or kind" as the subject merchandise will qualify as the foreign like product. *See id.* at 10–11.

Commerce additionally claims that there is no indication by referencing to "a foreign like product" in 19 U.S.C. § 1677b(e)(2)(A), Congress intended that CV profit be calculated based on merchandise that is identical or similar to the subject merchandise. *See id.* at 11. Commerce also notes that CV becomes available for NV only when identical or similar home market merchandise is not available for comparison with United States sales either because there are no such home market sales or they are below-cost and, thereby, are disregarded. *See id.* Commerce maintains that Congress could not have intended to limit the CV profit calculation under § 1677b(e)(2)(A) to profit incurred in the production or sale of merchandise identical or similar to the subject merchandise because, in that event, the preferred method of § 1677b(e)(2)(A) would rarely be applicable. *See id.* Commerce, therefore, argues that since there were sales of foreign like products that were not disregarded and actual profit amounts were realized by each respondent in connection with these sales, Commerce properly applied the preferred method by aggregating those profits. *See id.* at 13. To apply an alternative methodology where there are sales of the foreign like product, according to

Commerce, would virtually eliminate the statutory preference to calculate CV profit based upon § 1677b(e)(2)(A). *See id.*

Commerce further notes that in the *Proposed Regulations*, *see* 61 Fed. Reg. at 7335, it properly determined that (1) the language of 19 U.S.C. § 1677b(e)(2)(A) is unclear; and (2) the URAA legislative history does not show that the intent of Congress was to require Commerce to make separate CV profit calculations for identical bearings or bearing families, based upon RHP-NSK's narrow interpretation of the term "foreign like product," *see id.* at 11–15. Commerce, therefore, argues that its statutory interpretation of calculating CV profit, as reflected in its *Proposed Regulations* and the *Final Results*, was reasonable. *See id.* at 12.

Moreover, Commerce disagrees with RHP-NSK's assertion that Commerce ignored the explicit hierarchy of 19 U.S.C. § 1677(16) by calculating CV profit based on profits for products from all § 1677(16) categories. *See id.* at 15. Citing *U.H.F.C. Co. v. United States*, 916 F.2d 689 (Fed. Cir. 1990) (a pre-URAA case), and *Toyota Motor Sales, U.S.A., Inc. v. United States*, 22 CIT ____, 15 F. Supp. 2d 872 (1998) (a post-URAA case), Commerce argues that it is simply following its practice established under pre– and post-URAA law of applying the categories set forth under § 1677(16), which defines "such or similar" merchandise (now "foreign like product"), depending upon the particular context. *See* Def.'s Partial Opp'n to Mot. J. Agency R. at 15–17.

Because it is following established practice, Commerce also argues that there is no merit to RHP-NSK's claim that if Commerce's interpretations of the term "foreign like product" and 19 U.S.C. § 1677b(e)(2)(A) are correct, then Commerce must also use an aggregate price in calculating NV or COP. *See id.* at 17. Similarly, contrary to RHP-NSK's claim that Commerce expanded the meaning of the term "foreign like product" based upon the fact § 1677b(e)(2)(A) uses the term "a foreign like product" rather than "the foreign like product" or simply "foreign like product," Commerce claims that it merely set forth its statutory interpretation that the word "a" was not intended to overturn its prior practice of aggregating figures for profit and SG&A. *See id.*

Commerce, therefore, argues that the Court should sustain its CV profit determination because it is supported by substantial evidence and in accordance with law. *See id.* at 17–18.

3. Torrington's Contentions

In support of Commerce, Torrington first contends that 19 U.S.C. § 1677b(e)(2)(A) on its face permits a flexible application of "foreign like product" in CV profit calculations. *See* Torrington's Resp. to Pls.' Mem. Supp. Mot. J. Agency R. at 7. Torrington asserts that § 1677b(e)(2)(A)'s plural expression, "profits," and flexible expression, "in connection with," carries the clear meaning and intent that Commerce may calculate CV profit from multiple sales of relevant merchandise and by reference to more than one bearing "family," so long as the models in the calculation are reasonably "connected" to the particular model for which CV is being determined. *See id.* Torrington, therefore, argues

that § 1677b(e)(2)(A) does not limit Commerce to any particular narrow product-group. *See id.*

Torrington also contends that rules of statutory construction necessitates Commerce's broad and flexible interpretation of 19 U.S.C. § 1677b(e)(2)(A). *See id.* at 8. Torrington first notes that § 1677b(e)(2)(A) is the general rule and preferred basis for determining CV profit. *See id.* Torrington also notes that in most cases, CV forms NV only when a respondent reports insufficient sales of "foreign like product," as the term is narrowly understood, in the ordinary course of trade. *See id.* Accordingly, Torrington claims that if the Court construes § 1677b(e)(2)(A) narrowly in the CV profit context, it will effectively negate the general rule and preferred basis for CV profit calculations. *See id.* In support of its claim, Torrington asserts that (1) "courts [must] strive to give effect to all provisions in a statute, so as not to render a provision inoperative," *id.* (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)); and (2) courts must also "avoid giving statutes manifestly absurd interpretations which literal readings would otherwise support," *id.* (citing *United States v. Brown*, 333 U.S. 18, 27 (1948)). Torrington argues if the Court were to adopt RHP-NSK's position for calculating CV profit, the Court would clearly violate both of these rules. *See id.*

Torrington further contends that the crux of RHP-NSK's argument is that the term "foreign like product" under 19 U.S.C. § 1677(16) must be applied with rigid consistency in two different contexts, namely, those for (1) calculating price-based NV from home market sales of comparable merchandise, and (2) calculating CV profit. *See id.* at 10. Torrington disagrees with RHP-NSK, arguing first that "a determination * * * can be satisfactorily made" language of 19 U.S.C. § 1677(16) clearly provides that Commerce has discretionary authority to select among the categories of identical and similar merchandise to reach a satisfactory determination. *See id.* In other words, Commerce has the authority to make a satisfactory determination of what is encompassed by "foreign like product" and, therefore, it acted reasonably when it based CV profit on the sales of all foreign like products. *See id.* at 10–11, 13.

Torrington also asserts that Commerce reasonably concluded that "foreign like product" can differ by context, that is, depending upon whether the dumping comparison is based on (1) price-to-price, or (2) price-to-CV. *See id.* at 11. First, Torrington notes that when there are adequate home market sales made at above-cost prices of identical or similar merchandise, there is no need to determine profit, and the application of "foreign like product" turns to model-matching issues. *See id.* Under the model-matching methodology, Torrington notes that when price-to-price comparison is not between identical merchandise, a "satisfactory" determination of "foreign like product" dictates finding the most nearly similar product in order to minimize the need for adjusting NV for difference in cost attributable to differences in physical characteristics of the merchandise compared, pursuant to 19 U.S.C.

§ 1677b(a)(6)(C)(ii) (1994). *See id.* at 11, 13. Otherwise, according to Torrington, if Commerce determined that similar merchandise encompassed many AFB families, it would then have a rather difficult task of making numerous and highly complex adjustments, on a part-by-part basis, and then aggregating those adjusted prices to determine final NVs. *See id.* at 11–12. Torrington thereby contends that, in the context of model-matching methodology, Commerce might reasonably give the term "foreign like product" a narrow and pragmatic application to minimize such complex adjustments. *See id.* at 12.

On the other hand, Torrington notes that CV profit is invoked only when there are no available or usable home market sales of identical or similar merchandise in the ordinary course of trade. *See id.* Moreover, Torrington notes that Commerce does not use an absolute price in a home-market sale for CV profit; rather, it calculates an average profit rate (*i.e.*, based on total profits earned by total costs of goods sold) that, unlike a price for a particular bearing model, does not have to be adjusted for differences in physical characteristics between merchandise being compared. *See id.* Torrington claims that Commerce reasonably assumes that the profit rate earned on home market sales of all "foreign like products" is the rate that would have been earned for sales of the identical product, if sold at home in the ordinary course of trade. *See id.* at 12–13. Thus, Torrington asserts that "less precision in comparability is required to determine an appropriate CV profit rate than to determine appropriate models to compare." *Id.* at 13. Torrington, therefore, argues that, in the context of CV profit calculations, Commerce must give the term "foreign like product" a broader application so that "a determination * * * [could] be satisfactorily made," that is, a satisfactory determination on the basis of sales of all foreign like products. *See id.* at 12–13 (quoting 19 U.S.C. § 1677(16)).

Torrington also argues, *inter alia*, that, contrary to RHP-NSK's suggestion that the Court interpret the term "a foreign like product" of 19 U.S.C. § 1677b(e)(2)(A) in all contexts as referring to a singular class of identical merchandise or to a singular bearing family, the selection of the word "a" in the statute commonly means "any," and can be "applied to more than one individual object; whereas 'the' is an article which particularizes the subject spoken of." *Id.* at 14 (quoting *Allstate Ins. Co. v. Foster*, 693 F. Supp. 886, 889 (D.Nev. 1988) (quoting, in turn, Black's Law Dictionary, 1, 1324 (5th ed. 1979)). In addition, Torrington claims that judicial precedent supports construing the word "a" in a broader manner. *See id.* at 14–15 (citations omitted). Consistent with the common meaning and judicial precedent, Torrington asserts that the Court should sustain Commerce's interpretation that "a foreign like product" can mean "any" such product and all such products combined for purposes of calculating CV profit under § 1677b(e)(2)(A). *See id.* at 15.

C. Analysis

The issue primarily presented by RHP-NSK is whether 19 U.S.C. § 1677b(e)(2)(A) requires Commerce to calculate CV profit based on ac-

tual profit amounts incurred in the home market production and sale of model or family bearings that match each bearing model sold in the United States or, in the absence of such profit data, to use one of the alternative profit methodologies in § 1677b(e)(2)(B).

Section 1677b(e)(2)(A) specifically provides that Commerce must base CV profit on "actual amounts incurred and realized * * * in connection with the production and sale of a foreign like product." Similarly, the legislative history of the statute clarifies "that Commerce will base * * * profit only on amounts incurred and realized in connection with sales in the ordinary course of trade of the particular merchandise in question (foreign like product)." SAA at 839. Accordingly, an analysis of the statutory definition for the term "foreign like product" is critical to settle the CV profit issue RHP-NSK raises.

Title 19, United States Code, § 1677(16) sets forth, like its pre-URAA form,[8] a tripartite hierarchy for ascertaining "foreign like product." Section 1677(16) provides:

> The term "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16) (1994).[9] From this language, it is clear that Commerce must first select merchandise that is identical (*i.e.*, model-specific) with the subject merchandise sold in, or to, the United States. *See* 19

[8] Title 19, United States Code, § 1677(16) (1994) revised the pre-URAA precursor, 19 U.S.C. § 1677(16) (1988), *inter alia*, by substituting the term "foreign like product" for "such or similar merchandise," and deleting the phrase "which is the subject of an investigation" from § 1677(16). *See* SAA at 820; *see generally NSK Ltd. v. United States*, 190 F.3d 1321, 1329 (Fed. Cir. 1999); *Cemex, S.A. v. United States*, 133 F.3d 897, 902–03 (Fed. Cir. 1998) (both cases discussing pre-URAA § 1677(16)'s hierarchy for determining "such or similar merchandise").

[9] Although a "literal" reading of 19 U.S.C. § 1677(16)'s definition of the term "foreign like product" is for "a determination for the purposes of part II" of subtitle IV of the Tariff Act of 1930, the Court nevertheless finds that general rules of statutory construction dictate part IV's § 1677(16) is applicable in this case, that is, an administrative review of a final determination pursuant to part III of subtitle IV. *See generally Freytag v. Comm'r*, 501 U.S. 868, 877 (1991) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment") (citation and internal quotation marks omitted).

U.S.C. § 1677(16)(A). If such a match is not possible, then Commerce must select merchandise that is like (*i.e.*, similar to) the subject merchandise. *See id.* § 1677(16)(B). Finally, if neither identical nor like merchandise is available, merchandise of the "same general class or kind as the subject merchandise" will qualify as the "foreign like product." *Id.* § 1677(16)(C). In other words, as RHP-NSK correctly notes, once Commerce finds merchandise that matches the criteria stated by a § 1677(16) category, it need not consider the remaining categories because the statute specifically directs Commerce to determine "foreign like product" on the "first of the following categories in respect of which a determination * * * can be satisfactorily made." *Id.* § 1677(16); *see Federal-Mogul*, 918 F. Supp. at 396, *Cemex, S.A.*, 133 F.3d at 903 (noting same for pre-URAA § 1677(16)).

Additionally, § 1677(16)'s "can be satisfactorily made" language indicates, as Torrington imprecisely argues, that Commerce has the discretionary authority to select "foreign like product" in the first of the enumerated categories in which a satisfactory determination can be made. However, if a determination cannot be "satisfactorily made" relying on one of the three § 1677(16) categories, the Court notes that the statute and its legislative history are ambiguous with regard to the selection of "foreign like product" for use in calculating CV profit. Therefore, under these circumstances, the Court would have to proceed to the second step of *Chevron* to ascertain if Commerce's "foreign like product" selection for use in calculating CV profit was a reasonable interpretation under 19 U.S.C. § 1677b(e)(2)(A).

In this case, as noted earlier, Commerce decided that "[f]or those U.S. models which no identical or similar match was found, the CV of the U.S. model was used as the basis for the NV." *NSK-RHP Bearings—Preliminary Results Analysis Memo—Antifriction Bearings from the U.K.—Sixth Administrative Review, 5/1/94–4/30/95*, A–412–801, Proprietary Doc. No. 12 (Fiche 71), at 2 (July 2, 1996); *see Preliminary Results*, 61 Fed. Reg. at 35,718 (Commerce "used CV as the basis for NV when there were no usable sales of the foreign like product in the comparison market"). In other words, Commerce did not find merchandise that matches the criteria of the "identical" or "like" categories of "foreign like product" for purposes of calculating CV profit. *See* 19 U.S.C. § 1677(16)(A), (B). Rather, in calculating CV profit, Commerce used "aggregate data that encompasses all foreign like products under consideration for NV" to calculate profit for CV. *Final Results*, 62 Fed. Reg. at 2113. The Court finds that use of such aggregate data matches the criteria of

§ 1677(16)(C)'s "same general class or kind" category and, therefore,[10] Commerce's determination under 19 U.S.C. § 1677b(e)(2)(A) was in accordance with law. Moreover, the Court notes that since Commerce found that there were sales of foreign like products that were not disregarded and actual profit amounts were realized by RHP-NSK in connection with these sales for use in calculating CV profit under § 1677b(e)(2)(A), *see id.*, the three alternative CV methodologies in § 1677b(e)(2)(B) are in applicable, *see* 19 U.S.C. § 1677b(e)(2)(B) (stating that subparagraph (B) is applicable when "actual data are not available with the respect to the amounts described in subparagraph (A)"). Furthermore, in examining the structure of § 1677b(e), the Court concludes, as Commerce argued, that to apply one of § 1677b(e)(2)(B)'s alternative methodologies where there are such sales of the foreign like products would virtually eliminate the statutory preference to calculate CV profit based upon § 1677b(e)(2)(A). The Court also finds that the URAA legislative history supports the use of such actual profit data under § 1677b(e)(2)(A) to compute CV profit before resorting to § 1677b(e)(2)(B)'s alternative methodologies. *See* SAA at 839–40. In addition, having reviewed the record, the Court finds that Commerce's factual determinations concerning CV profit calculations are supported by substantial evidence. Accordingly, Commerce's CV profit methodology is affirmed.

The Court declines to address RHP-NSK's arguments concerning 19 C.F.R. § 351.405 conforming to the URAA because the revised regulation became effective for all administrative reviews initiated on the basis of requests made on or after July 1, 1997 and, therefore, is not applicable in this case. *See* 19 C.F.R. § 351.701 (1998) (clarifying applicability dates for regulations under 19 C.F.R. § 351); *see also Final Regulations*, 62 Fed. Reg. at 27,358–59 (discussing final amended regulation 19 C.F.R. § 351.405 and determination of product categories for calculating SG&A and profit for CV under 19 U.S.C. § 1677b(e)(2)(A)).

II. Inclusion of Zero-Priced Samples Transactions in RHP-NSK's United States Sales Database

During this review, Commerce included in RHP-NSK's United States sales database free sample bearings given away at no charge to potential United States customers. *See Final Results*, 62 Fed. Reg. at 2123. RHP-NSK argues that this case should be remanded to Commerce with instructions, pursuant to *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir.

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[10] In its brief, Commerce advanced the position that "[w]here * * * the subject merchandise is complex, encompassing numerous characteristics for matching, the foreign like product typically embraces more than one of the categories established in section 1677(16)." Def.'s Partial Opp'n to Mot. J. Agency R. at 10. The Court, however, cannot defer to this *post hoc* rationalization as a basis to uphold or overturn Commerce's decision to rely on aggregate data for "foreign like product" because Commerce's final determination must be sustained, if at all, on the same basis articulated in the determination by Commerce itself. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) ("The courts may not accept * * * counsel's *post hoc* rationalizations for agency action; * * * an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself."); *see also Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely * * * counsel's '*post hoc* rationalizations' for agency action, advance for the first time in the reviewing court."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

1997), to exclude RHP-NSK's zero-priced sample transactions from the dumping margin calculations. *See* Pls.' Mem. Supp. Mot. J. Agency R. at 4–5, 15–16; Pls.' Reply Mem. Supp. Mot. J. Agency R. at 9–10.

Commerce agrees that a remand under *NSK* is proper and that, on remand, it should exclude from RHP-NSK's United States sales database those sample transactions for which RHP-NSK received no consideration. *See* Def.'s Partial Opp'n to Mot. J. Agency R. at 2–3, 18.

Although Torrington concedes that *NSK* holds that sales must be for consideration to be cognizable under the antidumping law, Torrington nevertheless argues that RHP-NSK failed to meet its burden of proving that the transactions in question were free of broader forms of consideration, that is, consideration other than money and, therefore, no remand is necessary. *See* Torrington's Resp. to Pls.' Mem. Supp. Mot. J. Agency R. at 16–18. In the alternative, Torrington argues that if a remand is ordered, the Court should not rule that RHP-NSK's sample transactions should be categorically excluded; rather, it should instruct Commerce to reevaluate the record to determine whether RHP-NSK's sample transactions are in fact without consideration. *See id.* at 16, 18.

Commerce is required to impose antidumping duties upon merchandise that "is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673(1) (1994). A zero-priced transaction, however, does not qualify as a "sale" and, therefore, cannot be included in Commerce's dumping margin calculations. *See NSK*, 115 F.3d at 975 (holding "that the term 'sold,' as used in 19 U.S.C. §§ 1673 and 1677a(c), requires both a transfer of ownership to an unrelated party and consideration"). Thus, the distribution of AFBs for no consideration falls outside the purview of § 1673. Consequently, the Court remands to Commerce to exclude from RHP-NSK's United States sales database any sample transactions that were not supported by consideration and to adjust the dumping margins accordingly.

III. Inclusion of Imputed Inventory Carrying Costs in the CEP Offset When Comparing CEP Sales to CV

In the *Final Results*, Commerce "regard[ed] the inventory carrying costs [RHP-NSK] incurred in the home market, which are incurred prior to the sale, transfer, or shipment of the merchandise to the U.S. affiliate, as an expense incurred on behalf of the sale to the U.S. affiliate." 62 Fed. Reg. at 2124. Commerce did not consider this to reflect a commercial activity in the United States and, therefore, it did not deduct domestic inventory carrying costs from CEP for the *Final Results*. *See id.*

RHP-NSK claims that Commerce correctly complied with the CEP offset provision, 19 U.S.C. § 1677b(a)(7)(B) (1994), by including inventory carrying costs in the CEP offset when it matched CEP sales to home market price-based NVs, but it violated the statute when it failed to include imputed inventory carrying costs in the CEP offset when it matched CEP sales to CV. *See* Pls.' Mem. Supp. Mot. J. Agency R. at 5, 16–17. RHP-NSK notes that Commerce corrected this clerical error in the subsequent AFB review when it included inventory carrying costs in

the CEP offset for CEP sales matched to CV. *See id.* at 5 (citing *Antifriction Bearings from Japan-NSK Ltd. (NSK) Preliminary Results Analysis Memo Seventh Administrative Review 5/1/95–4/30/96*, A–588–804, Proprietary Document, at 10–11 (Mar. 28, 1997)). RHP-NSK requests that the Court remand the issue and instruct Commerce to include inventory carrying costs in the CEP offset when matching CEP sales to CV. *See id.* at 17. Commerce agrees with RHP-NSK's remand request. *See* Def.'s Partial Opp'n to Mot. J. Agency R. at 3, 18.

Torrington disagrees with RHP-NSK, noting that although under Commerce's prior practice "deductions from exporter's sale price (now called [CEP]) included imputed costs for carrying inventory from the time the merchandise left the home market factory to the time of its shipment to the first unrelated customer in the United States," Commerce's practice under the new law, on the United States side, is not to deduct "the cost of carrying inventory from the time the merchandise leaves the factory to the time of the sale to the U.S. affiliate." Torrington's Resp. to Pls.' Mem. Supp. Mot. J. Agency R. at 19. Thus, Torrington argues that the rationale for an offsetting deduction has evaporated. *See id.* In the alternative, Torrington contends that if a remand is ordered, the Court should instruct Commerce to ensure that the sum of the average imputed financial expenses (*i.e.*, both imputed credit and imputed inventory carrying costs) deducted from CV do not exceed the per-unit actual interest expenses included in the CV-buildup. *See id.* Torrington explains that since 19 U.S.C. § 1677b(e) requires that CV be "equal to" all actual costs of materials and fabrication, SG&A and profit, deductions of imputed financial expenses greater than the reported actual amounts will result in the unlawful diminution of the reported costs. *See id.* at 19–20. Torrington, therefore, asserts that if a remand is ordered, Commerce's margin calculation program should be modified to include an appropriate cap on the deduction of average imputed expenses from CV. *See id.* at 20.

Title 19, United States Code, § 1677b(a)(1)(B) requires Commerce to establish NV to the extent practicable, at the same level of trade ("LOT") as the EP or CEP. When Commerce is unable to match United States sales with foreign market sales at the same LOT, an adjustment to NV should be made to account for the differences in price that result from the differences in LOT. *See* 19 U.S.C. § 1677b(a)(7)(A). When the data available does not provide an appropriate basis to grant a LOT adjustment under § 1677b(a)(7)(A), but NV is established at a LOT constituting a more advanced stage of distribution than the LOT of the CEP, the statute ensures a fair comparison between United States price and NV by reducing NV by what is known as the "CEP offset." *See* 19 U.S.C. § 1677b(a)(7)(B) (CEP offset is an adjustment that is made to NV when NV is being compared to CEP sales in the United States). Specifically, the CEP offset adjustment is made by reducing NV "by the amount of indirect selling expenses incurred in the country in which [NV] is determined on sales of the foreign like product," but this deduction may not

exceed (*i.e.*, it is "capped" by) the amount of the indirect selling expenses deducted in calculating CEP. *See id.* Since the inventory carrying costs at issue constitute an indirect selling expense incurred in the home market on the sales of the foreign like product, the Court, therefore, remands to Commerce to include the imputed inventory carrying costs in the calculation of CEP offset for RHP-NSK when matching CEP sales to CV. *See generally Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 Fed. Reg. 8909, 8915 (Feb. 23, 1998) (Commerce included inventory carrying costs in the CEP offset for CEP sales matched to price-based NVs and CV).

Conclusion

For the foregoing reasons, the case is remanded to Commerce to: (1) exclude from RHP-NSK's United States sales database any sample transactions that were not supported by consideration and to adjust the dumping margins accordingly; and (2) include imputed inventory carrying costs in the calculation of CEP offset for RHP-NSK when matching CEP sales to CV. Commerce's final determination is affirmed in all other respects.

(Slip Op. 99-135)

NSK Ltd., NSK Corp., Koyo Seiko Co., Ltd., Koyo Corp. of U.S.A., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN Corp., NTN Driveshaft, Inc., and NTN-Bower Corp., plaintiffs and defendant-intervenors, and Nippon Pillow Block Sales Co., Ltd. and FYH Bearing Units USA, plaintiffs *v.* United States, defendant, and Torrington Co., defendant-intervenor and plaintiff, and Honda Motor Co., Ltd., American Honda Motor Co., Inc., Honda of America Mfg., Inc., and Honda Power Equipment Mfg., Inc., defendant-intervenors

Consolidated Court No. 95-03-00239

(Dated December 17, 1999)

JUDGMENT

Tsoucalas, *Senior Judge:* In accordance with the decision (Sept. 2, 1999) and mandate (Oct. 25, 1999) of the United States Court of Appeals for the Federal Circuit ("CAFC"), Appeal Nos. 98-1547, -1548, -1582, it is hereby

Ordered, adjudged and decreed that the decision and order of this Court in connection with *NSK Ltd. v. United States*, 21 CIT ____, 969 F. Supp. 34 (June 17, 1997), which directed Commerce to "review the re-

cord to (a) determine whether it is possible to remove those portions of Koyo's warranty expenses which relate to non-scope merchandise from adjustments to FMV or (b) deny the adjustment if such removal cannot be made," is vacated, and the Court reinstates Commerce's handling of Koyo's home market warranty expenses in the final determination, and the CAFC having affirmed this Court on all other issues, judgment is entered accordingly.

(Slip Op. 99–136)

NEC CORP., HNSX SUPERCOMPUTERS, INC., FUJITSU LTD., AND FUJITSU AMERICA, INC., PLAINTIFFS *v.* DEPARTMENT OF COMMERCE AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND CRAY RESEARCH, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 97–11–01967

[ITC Remand Determination Affirmed]

(Decided December 17, 1999)

Paul, Weiss, Rifkind, Wharton, & Garrison (Robert E. Montgomery, Jr., Terence J. Fortune, David J. Weiler) for Plaintiffs NEC Corporation and HNSX Supercomputers, Inc.

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Warren E. Connelly, Steven G. Johnston) for Plaintiffs Fujitsu Limited and Fujitsu America, Inc.

Lyn M. Schlitt, General Counsel; *James A. Toupin*, Deputy General Counsel; *Cynthia P. Johnson*, Attorney, Office of General Counsel, U.S. International Trade Commission, Counsel for Defendants Department of Commerce and U.S. International Trade Commission.

Wilmer, Cutler & Pickering (John D. Greenwald, Deirdre Maloney) for Defendant-Intervenor Cray Research, Inc.

OPINION

POGUE, *Judge:* On December 15, 1998, the Court remanded this matter to the International Trade Commission ("Commission"). *NEC Corp. v. DOC*, 22 CIT ___, 36 F. Supp. 2d 380 (1998) ("*NEC I*"). In particular, the Court ordered the Commission to reconsider its threat determination in order to further explain how the subject less-than-fair-value ("LTFV") imports themselves make a material contribution to the threatened material injury. *NEC I*, 22 CIT at ___, 36 F. Supp. 2d at 394.

BACKGROUND

On July 29, 1996, Cray Research, Inc. ("Cray"), filed a petition with the Department of Commerce ("Commerce") alleging that vector supercomputers from Japan are being, or are likely to be sold in the United States at LTFV, and that such imports are materially injuring, or threatening material injury to an industry in the United States. *See Vector Supercomputers from Japan*, 61 Fed. Reg. 43,527 (Dep't Commerce 1996) (initiation antidumping duty investig.).

Commerce published a preliminary determination, *Vector Supercomputers from Japan*, 62 Fed. Reg. 16,544 (Dep't Commerce 1997)(prelim. determination), and a final determination, *Vector Supercomputers from Japan*, 62 Fed. Reg. 45,623 (Dep't Commerce 1997)(final determination), concluding that Japanese vector supercomputers were being sold at LTFV in the United States.

On October 9, 1997, the Commission promulgated its final injury determination, concluding that the domestic industry is threatened with material injury by reason of LTFV imports of Japanese vector supercomputers. *Vector Supercomputers from Japan*, Inv. No. 731–TA–750 (Final) (List No. 1, Doc. 223) (October 9, 1997); *reprinted in* 62 Fed. Reg. 53,801 (Int'l Trade Commission 1997) ("Final Determination").[1] The Commission, however, found no present material injury. *Id.* at 36.

Commerce published an antidumping order covering the subject merchandise on October 24, 1997. *Vector Supercomputers from Japan*, 62 Fed. Reg. 55,392 (Dep't Commerce 1997) (notice antidumping duty order). The margin found for Fujitsu was 173.08%. The margin found for NEC was 454%. *Id.* at 55,393.

The Commission's Final Determination was appealed to this Court by Fujitsu Limited and Fujitsu America, Inc. (collectively "Fujitsu"), and NEC Corporation and HNSX Supercomputers Inc. (collectively "NEC"). Ruling on the consolidated action of Fujitsu and NEC (collectively "Plaintiffs"), this Court sustained in part and remanded in part. The Court sustained the Commission's finding that vector supercomputers are a separate like product, *see NEC I*, 22 CIT at ___, 36 F. Supp. 2d at 390, but remanded for further explanation or reconsideration the Commission's finding that the domestic industry is threatened with material injury by reason of LTFV imports of vector supercomputers from Japan. *See id.* at ___, 36 F. Supp. 2d at 394.

The Commission issued a remand determination in *Vector Supercomputers from Japan*, Inv. No. 731–TA–750 (Final)(Remand) (Remand List No. 2R, Doc. 181)(March 16, 1999)("Remand Determination"). The Court now reviews the Commission's Remand Determination.[2]

STANDARD OF REVIEW

The court will uphold a determination by the Commission unless it is not supported by substantial evidence in the administrative record or is otherwise not in accordance with the law. *See* Section 516a(b)(1)(B)(i) of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

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[1] List 1 consists of documents within the public portion of the record made before the Commission. List 2 consists of the documents within the confidential portion of the same record. List 3 consists of the documents within the privileged portion of the same record.

Reference is also made to *Vector Supercomputers from Japan*, Inv. No. 731–TA–750 (Final) (Remand). Remand Record List 1R consists of the documents within the public portion of the record made before the Commission. Remand Record List 2R consists of the documents within the confidential portion of the same record. Remand Record List 3R consists of the documents within the privileged portion of the same record.

[2] Three Commissioners, Chairman Bragg, Vice Chairman Miller, and Commissioner Koplan, found affirmatively on remand. Chairman Bragg submitted separate views. Commissioner Askey found negatively on remand.

DISCUSSION

1. On remand, did the Commission reconsider its threat of material injury finding in a way consistent with the requirement that the LTFV imports themselves must have made a material contribution to the threatened material injury?

The Court of Appeals for the Federal Circuit has articulated the following legal standard regarding present material injury determinations: "An affirmative injury determination requires both (1) present material injury and (2) a finding that the material injury is 'by reason of' the subject imports." *Gerald Metals, Inc. v. United States*, 21 CIT ___, ___, 132 F.3d 716, 719 (Fed. Cir. 1997) ("Gerald Metals I"). This Court has held that "the 'by reason of' standard also applies to threat determinations." *Gerald Metals, Inc. v. United States*, 22 CIT ___, ___, 27 F. Supp. 2d 1351, 1365 n.17 (1998) ("Gerald Metals II"). In *NEC I*, this Court explained that to make a threat determination, "the statute requires adequate evidence to show that the [threat of] harm will occur by reason of the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by the LTFV goods." 22 CIT at ___, 36 F. Supp. 2d at 391; *see also* 19 U.S.C. 1677(7)(A) (1994) ("The term 'material injury' means harm which is not inconsequential, immaterial or unimportant."); 19 U.S.C. 1677(7)(F)(ii) ("[A] [threat] determination may not be made on the basis of mere conjecture or supposition."). In sum, the standard requires "'a causal—not merely temporal—connection between the LTFV goods and the [threat of] material injury.'" *Id.* (quoting *Gerald Metals*, 132 F.3d at 720)(brackets in original).

In its Remand Determination, the Commission appears to have understood the applicable legal standard: "the Commission may not analyze subject imports in a vacuum. Instead, we fully consider other significant economic factors in determining that subject imports themselves contribute in a more than *de minimis* way to material injury or threat." Remand Determination at 5. The Court had criticized the Commission in *NEC I* for its failure to "undertake any analysis to distinguish between the contribution to material harm caused by LTFV goods and these economic factors unrelated to the subject imports." 22 CIT at ___, 36 F. Supp. 2d at 392. In its Remand Determination, the Commission attempts to explain more fully than it did in its Final Determination how, after considering the effects of "other factors," the Commission is able to conclude that the subject imports themselves pose a threat of material injury.[3]

In its Final Determination, the Commission found a threat of material injury. *See* Final Determination at 38. However, the Commission found no *present* material injury on the ground that the "other factors," and *not* the subject imports from Japan, had caused whatever present

[3] Three "other factors" have been identified by the parties: the decline in recent years in government spending on vector supercomputers; the rise in the number of vector applications that may be performed by non-vector supercomputers; and the financial restructuring Cray undertook in the mid-1990's.

material injury the domestic industry had suffered. *See* Final Determination at 36. In its Remand Determination, the Commission again found a threat of material injury, and explained its determination by demonstrating that the "other factors" will decline in significance in the future. *See* Remand Determination at 9–11. Thus, although the "other factors" will continue to affect the condition of the domestic industry, they will not have such an overwhelming effect as to prevent a finding of threat of material injury. *See* Remand Determination at 13.

Separately, the Commission conducted a "vulnerability analysis," and determined that the "other factors" had weakened the financial condition of the domestic industry, thus rendering it vulnerable to injury by reason of subject imports. *See* Remand Determination at 11–12. The Commission then considered the statutory factors—including the "other factors"—in the context of a vulnerable domestic industry, and determined that subject imports themselves make a material contribution to the threat of material injury. *See* Remand Determination at 12.

Plaintiff NEC contends that this approach fails to meet the "by reason of" standard. NEC rejects the "vulnerability analysis" used by the Commission on the basis that it "effectively *cumulates* the impact of imports with non-import factors, when the statute requires just the opposite: that the Commission *distinguish* between imports and non-import factors." Cmts. of NEC on the Commission's Remand Determination ("NEC Remand Cmts.") at 5–6.

The Court disagrees. In a threat determination, "vulnerability analysis" is appropriate and relevant to consider as "among other relevant economic factors."[4] U.S.C. § 1677(7)(F)(i) (1994). Underlying vulnerability analysis is the principle that the foreign industry must "take the domestic industry as [it] finds it." *Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 1561, 1569 (Fed. Cir. 1996) (quoting *Iwatsu Elec. Co. v. United States*, 15 CIT 44, 57, 758 F. Supp. 1506, 1518 (1991)). In *Goss Graphics*, the Court endorsed the use of "vulnerability analysis," so long as "the Commission did not substitute its finding of vulnerability for consideration of the statutory criteria."[5] *Goss Graphics*, 22 CIT at

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[4] *See, e.g., Calabrian Corp. v. United States Int'l Trade Comm'n*, 16 CIT 342, 353, 794 F. Supp. 377, 387 (1992)("The present relative health of an industry is an important indicator as to the imminence of material injury."); *Bando Chem. Indus. v. United States*, 17 CIT 798, 803–04 (1993), *aff'd* 26 F.3d 139 (Fed. Cir. 1994)(approving use of "vulnerability analysis" in threat determination); *Goss Graphics Sys., Inc. v. United States*, 22 CIT ____, ____, 33 F. Supp. 2d 1082, 1101 (1998), *appeals docketed*, Nos. 99–1150, 99–1151, 99–1152 (Fed. Cir. 1999)("ITC's consideration of the current state of the domestic industry was appropriate and relevant to this proceeding."). The Statement of Administrative Action to the Uruguay Round Agreements Act describes vulnerability analysis in mandatory terms: "In threat determinations, the Commission must carefully assess current trends and competitive conditions in the marketplace to determine the probable future impact of imports on the domestic industry and whether the industry is vulnerable to future harm." Statement of Administrative Action, H.R. Doc. No. 103–316 (1994), *reprinted in* 6 Uruguay Round Agreements Act, Legislative History, at 885 ("SAA").

The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *." SAA at 656. "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.* (quoted in *Delverde, SrL v. United States*, 21 CIT ____, ____, 989 F. Supp. 218, 229–30 n.18 (1997)).

[5] *See also Calabrian Corp.*, 16 CIT at 354, 794 F. Supp. at 388 (recognizing that vulnerability analysis "only establishes the background against which the Commission considers the likely effect of future imports, based on consideration of the factors set forth in the statute"); *Suramerica De Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994)(holding that the Commission must examine all "factors that tend 'to make the existence of a [threat of material injury] more probable or less probable[.]'")(citing Fed. R. Evid. 401, 19 C.F.R. § 210.42(b) (1994))(brackets in original).

____, 33 F. Supp. 2d at 1101. Accordingly, an affirmative threat determination based solely on a finding of vulnerability coupled with the presence of statutory factors would be the kind of temporal connection disapproved of in *Gerald Metals*. Yet the "by reason of" standard is met if the Commission can articulate a causal connection between the threat of injury to the domestic industry and the subject imports themselves, while avoiding attributing the threat from non-import factors to threat from subject imports. *See Goss Graphics*, 22 CIT at ____, 33 F. Supp. 2d at 1103 (affirming the Commission's conclusion that, "[t]he vulnerability of the industry in combination with the adverse trends of increased subject imports and the small number of pending sales created the threat of material injury.").

Here, the Commission acted properly. Its analysis indicates that the Commission appreciated the distinction between "cumulating" and "distinguishing." The Commission considered how "other factors" had made the domestic industry vulnerable, not just to the general impact of market forces, but to the specific impact of the subject imports. Further, the Commission considered to what degree "other factors" contributed to the threat of material injury *separate from*, not in addition to, the contribution of the subject imports. The Commission concluded that (1) "other factors" are not the overwhelming cause of the threat of material injury; (2) "other factors" had, however, rendered the domestic industry vulnerable to the threat of subject imports; and (3) subject imports themselves pose a material threat to this vulnerable domestic industry, notwithstanding the ongoing contribution of "other factors." Thus, the Commission effectively distinguished the impact of non-import factors from the impact of import factors.[6]

Plaintiff Fujitsu opposes the Commission's analysis by arguing that, "as a matter of law, the Commission could not make an affirmative threat finding on remand without first considering the impact which the relevant 'conditions of competition,' which the Commission refers to as 'vulnerability factors,' would have on Japanese imports." Fujitsu Remand Cmts. at 2. Buy American restrictions, the prevalence of sole source procurements favoring the domestic industry, the decline in government funding for projects for which Japanese imports compete, and the increased substitution of non-vector for vector systems "make it extremely unlikely, if not impossible, for Japanese producers to increase their U.S. sales volumes or market share * * *." Fujitsu Remand Cmts. at 27.

The Court disagrees with Fujitsu that the Commission's analysis necessarily failed to meet the required legal standard. The Commission con-

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[6] "Weighing," in the sense of determining whether the impact of any one factor is more or less significant than the impact of any other, is not required. The requirement is one of non-attribution, as explained in *Taiwan Semiconductor Indus. Ass'n v. United States*, 23 CIT ____, 59 F. Supp. 2d 1324, 1331 (1999): "Where other sources of injury are known, the Commission must conduct some examination to ensure that it does not attribute the harmful effects from the other factors to the subject imports." Fujitsu accurately stated in its Remand Cmts. that, "one form of 'weighing' is absolutely required, and that is the weighing by which the Commission must determine whether imports 'themselves' threaten to cause material injury or whether they threaten to have only a *de minimis* or tangential effect." Fujitsu's Cmts. on the ITC's Remand Determination ("Fujitsu Remand Cmts.") at 5–6.

sidered the evidence referenced by Fujitsu, but reached the opposite conclusion as to their effects on Japanese importers. *See* discussion *infra*, Part 2. Fujitsu drew its conclusion from the same evidence, while pointing to other evidence on the record favorable to foreign producers. Nonetheless, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Com.*, 383 U.S. 607, 620 (1966); *see also Goss Graphics*, 22 CIT at ____, 33 F. Supp. 2d at 1104 ("Although Plaintiffs are correct that some of the record evidence could lead to different conclusions, the ITC has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis.").

The Commission's approach demonstrates that the Commission understood and applied the Court's instruction on remand to "ma[k]e the requisite determination that the LTFV imports themselves made a material contribution to the threatened material injury." *NEC I*, 22 CIT at ____, 36 F. Supp. 2d at 394. Therefore, if the various aspects of the Commission's analysis are supported by substantial evidence, and the Remand Determination is otherwise in accordance with the law, the Commission will have complied with the Court's Remand Order.

2. Is the Commission's determination that the domestic industry is threatened with material injury supported by substantial evidence and otherwise in accordance with law?

The statute governing threat determinations requires the Commission to consider, "among other relevant economic factors," nine enumerated factors. Four factors are relevant to this case:[7]

> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> * * * * * * *
>
> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, includ-

[7] Inventories and product shifting (factors V and VI) are not relevant to this investigation. Remand Determination at 8. Also, neither a countervailable subsidy (factor I) nor a raw agricultural product (factor VII) is involved.

ing efforts to develop a derivative or more advanced version of the domestic like product[.]

19 U.S.C. § 1677(7)(F)(i)(1994).

Below, the Court reviews Commission's analysis regarding each of the relevant factors, including "other factors," to determine whether substantial evidence supports its findings, and whether that analysis was conducted in a manner consistent with the legal standard articulated above and otherwise in accordance with law.[8]

a. Volume and Capacity

The Commission found that subject import volumes and market share increased significantly during 1996 and interim 1997, citing the number of imported systems viewed absolutely and relative to the number of domestic systems shipped, and the value and computing power of those systems.[9] The Commission also considered evidence of the cancellation or postponement of several sales to Japanese producers due to the pendency of its investigation. Based on this evidence, the Commission concluded that subject imports will likely continue to enter the U.S. market at an increased volume. *See* Remand Determination at 7; Final Determination at 40–41.

The Commission also explained how this increase in volume threatens material injury to the domestic industry. First, because of the small size of the vector supercomputer market in terms of numbers of systems sold, and the high purchase price of each system, the Commission concluded that the loss of even one sale has a significant impact on the producer. *See* Remand Determination at 12 (citing Final Staff Report at I–22, VI–2 (Table VI)). Second, Japanese producers have succeeded recently in making inroads into the high end of the market, where profit margins are the greatest.[10] Remand Determination at 7; Final Determination at 43 (citing Final Staff Report at V–6 through V–7 (Table V–1), VI–3). The Commission concluded that an increase in subject imports, aimed in part at the high end of the market, combined with

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[8] Plaintiffs are correct in pointing out that, in the "price effects" analysis contained in the Remand Determination, the Commission "mistakes the Court's use of an example showing how the Commission omitted the required analytically distinct determination of material cause for a complete statement of the errors which it made." Fujitsu Remand Cmts. at 4. In *NEC I*, the Court found the Commission's analysis of one of the statutory factors—the price effects of future imports—to be lacking in a way that *exemplified* the legal error committed in the Final Determination: "[T]he Court is nothing [sic] that neither the Commission's finding overall, *nor its analysis of the individual statutory threat factors*, indicate that it applied the analysis mandated by the Federal Circuit." 22 CIT at ____, 36 F. Supp. 2d at 393 n.9 (emphasis added). On remand, the Commission was required to analyze *all* relevant statutory factors in a manner consistent with the legal standard set out above. The Commission consequently appears to have misinterpreted the Remand Order by analyzing separately the price effects factor. *See* Remand Determination at 1. Nonetheless, the mistake need not be fatal, if the Commission successfully addressed all relevant statutory factors in other sections of the Remand Determination.

[9] Remand Determination at 6–7; *Vector Supercomputers from Japan*, Inv. No. 731–TA–750 (Final)(List 2, Doc. 35)(Sept. 16, 1997)("Final Staff Report") at IV–5 (Table IV–2), IV–6 (Table IV–3). Plaintiffs contend that the Commission should not have included "internally transferred machines" in its computation of the number of systems imported. *See* NEC Remand Cmts. at 26–27; Fujitsu Remand Cmts. at 8–10. The Commission, however, considered this evidence and decided not to credit respondents' assertion that these machines were restricted to internal use (*see* Final Determination at 41 n.133); furthermore, the Commission has "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." *Goss Graphics*, 22 CIT at ____, 33 F. Supp. 2d at 1104; *accord Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985).

[10] The most important of these transactions was the proposed sale of an NEC vector supercomputer to the University Corporation for Atmospheric Research ("UCAR"). This high-value contract was canceled, however, due to the Commission's investigation. *See* Remand Determination at 18–19.

aggressive pricing, *see* discussion *infra* Part 2.b, threatens the domestic industry with material injury. *See* Remand Determination at 12.

The Commission also found that Japanese producers' capacity increased during the period of investigation, and that capacity will increase in the future. *See* Remand Determination at 8; Final Determination at 38 (citing Final Staff Report at VII–7 (Table VII–1), VII–8 (Table VII–2)). The Commission pointed to evidence that, in the supercomputer industry, capacity levels are set by the decision to produce a certain number of products, rather than material or other production constraints. *See* Remand Determination at 8; Final Determination at 38–39 (citing Final Staff Report at VII–4). Therefore, the Commission found that a decision by Japanese producers to substantially increase imports into the United States is feasible in terms of capacity. *See* Remand Determination at 8; Final Determination at 39. In addition, the Commission cited trend evidence indicating that, as a percentage of total systems shipped, exports to both the Japanese market and other export markets will decline, while imports to the United States will increase in the future.[11] *See* Remand Determination at 8; Final Determination at 39 (citing Final Staff Report at VII–7 (Table VII–1)). Considering all the evidence, we conclude that the Commission's findings are supported by substantial evidence and otherwise in accordance with the law.

Plaintiff Fujitsu argues that the Commission has failed to prove, in an "analytically distinct step," that increased import volumes would "by themselves" threaten material injury. *See* Fujitsu Remand Cmts. at 6. The Court does not agree that the Commission is required to take such a step with respect to each individual statutory factor. The key to the "by reason of" test is a showing that "these factors *as a whole* indicate that the LTFV imports made a material contribution to the threat of the material injury." *Goss Graphics*, 22 CIT at ____, 33 F. Supp. 2d at 1090 (emphasis added). The Commission, in analyzing import factors separately, need only meet the individual factor requirements of § 1677(7)(F)(i)(I-IX); here, for example, that unused capacity and volume increases "indicat[e] the likelihood of substantially increased imports." In the course of its analysis, the Commission must also meet the "as a whole" requirement of § 1677(7)(F)(ii); that is, it must demonstrate that the domestic industry is threatened with material injury by reason of subject imports themselves, considering the statutory factors as a whole. That the Commission weaves these various elements of the analysis into the fabric of

[11] Plaintiff Fujitsu argues that there is insubstantial evidence to support the conclusion that increased imports to the United States will continue in the future. The cancellation of the UCAR transaction has apparently made government buyers wary of purchasing from Japanese producers. Fujitsu Remand Cmts. at 16–17. The Commission, however, found more persuasive evidence of four potential sales of NEC vector supercomputers, three to commercial buyers and one to a government entity, and four potential sales of HNSX products, all to commercial buyers. Though some of these sales were canceled due to the pendency of the antidumping investigation, this evidence demonstrates that, even if the domestic industry had a monopoly over government sales, a significant commercial market exists for Japanese exports. *See* Final Determination at 41–42 & n.134; Final Staff Report at V–7 (Table V–1), V–10 (Table V–2), V–16 (Table V–5), V–19 (Table V–6); *Vector Supercomputers from Japan*, Inv. No. 731–TA–750 (Final)(List 2, Doc. 21)(Aug. 21, 1997) ("Cray Pre-Hearing Brief") at Annexes E, F. The Court finds that Plaintiffs have failed to show that the Commission's evidence is insubstantial.

its threat determination does not mean that it has failed to meet the "by reason of" standard.[12]

b. Price Effects

The Court ordered the Commission "to explain how bids involving imports would affect future prices when prices has [sic] not been previously determinative." *NEC I*, 22 CIT at ____, 36 F. Supp. 2d at 394. In its Remand Determination, the Commission responded that price is and has always been an important factor,[13] but that "adverse price effects were not *significant* during the [present material injury] investigation, rather than nonexistent." Remand Determination at 16. With respect to the threat determination, however, the Commission found that "subject imports are likely to suppress or depress prices to a significant degree in the imminent future." Remand Determination at 17.

Plaintiffs contest the causal relationship between domestic price declines and imported products.[14] NEC argues that the Commission minimized the price effects of non-import factors, in particular the advance of technology. *See* NEC Remand Cmts. at 19–20. Fujitsu argues that the Commission failed to take into account the price effects of non-vector systems, claiming that competition from aggressively priced non-vector systems is to blame for declines in prices of domestic vector systems. *See* Fujitsu Remand Cmts. at 21–27.

The Court disagrees. First, the Commission did take into account the price effects of non-vector systems at the low to middle end of the market; the Commission found that competition from non-vectors does not significantly affect the high end of the vector market. *See* Remand Determination at 17 (citing Final Staff Report at I–22). Plaintiff Fujitsu challenges this finding, but fails to distinguish between evidence that some non-vector systems are sold at very high prices and evidence that the overlap of markets for non-vector and vector systems, and therefore competition between the two systems, occurs primarily at the low to middle end of the market.[15]

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[12] *NEC I* emphasized that there is no "'magic words analysis.'" 36 F. Supp. 2d at 393 n.9. The Commission need not lay out its analysis in some prescribed way, so long as the legal standard is met: "'A court may "uphold [an agency's] decision of less than ideal clarity if the agency's path may be reasonably discerned."'" *Id.* (citations omitted) (brackets in original).

[13] The Commission pointed to anecdotal evidence on the record of purchasers' desire to obtain the highest price/performance ratio, and the role price plays in the bidding procedure, to substantiate its finding that "price is a critical factor in all purchasing decisions." Remand Determination at 14–16 & nn.52–54, 56–57 (citing several confidential Questionnaire responses). Fujitsu produced detailed analysis to show that purchases of Japanese products were made for reasons other than price. *See* Fujitsu Remand Cmts. at 11–14. The record indicates, however, that only one of these purchasers did not consider price at all. In all the other purchases, price appears to have been an important consideration. *See* Final Staff Report at V–28 through V–32.

[14] In *Taiwan Supercomputers*, this Court held that, in order to prove the causal relationship between the underselling of imports and domestic price declines, price declines that may be attributed to other factors must be accounted for. *See* 23 CIT at ____, 59 F. Supp. 2d at 1333.

[15] Record evidence indicates that, while non-vector systems did bid for high-value sales for which vector systems also competed, the non-vector bids were largely unsuccessful. *See* Final Staff Report at V–8 through V–11 (Table V–2), V–17 through V–19 (Table V–6); *see also* Def.'s Response to Cmts. on Commission's Remand Determination at 30–31. The high-value sales actually won by non-vector systems appear to have included bids only from other non-vector producers, or were sole-sourced. *See, e.g.*, *Vector Supercomputers from Japan*, Inv. No. 731–TA–750 (Final)(List 2, Doc. 144)(Sept. 5, 1997)(Questionnaire—Purchaser Filed by University A) at 16–18; *Vector Supercomputers from Japan*, Inv. No. 731–TA–750 (Final)(List 2, Doc. 164)(Sept. 19, 1997)(Questionnaire—Producer Filed by Company A)("Company A Responses") at 2, 5–6. In light of the Commission's earlier finding that vector and non-vector systems are not "like products" (Final Determination at 21), the Commission has presented substantial evidence of separate markets for high-value vector and non-vector systems.

Second, while NEC is correct that the Commission did not explicitly address the tendency of improved technology to put downward pressure on prices, the Commission did so implicitly by addressing the *unnatural* downward pressure on prices caused by aggressive pricing of products on technical parity with their competitor. The Commission found that aggressively priced subject imports[16] had been of a lower quality than the domestic product during most of the period of investigation.[17] *See* Remand Determination at 17. The UCAR sale demonstrated that while the "quality gap" had closed, aggressive pricing continued. *See* Remand Determination at 18–20 & n.65 ("We believe that a comparison of the initial and final bid data reported by NEC provides a rough indication of the magnitude of the change in the price per GFLOPS.")(quoting *Vector Supercomputers from Japan*, Inv. No. 731–TA–750 (Final)(List 2, Doc. 169)(Sept. 19, 1997)(Questionnaire—Importer Filed by Company B) at 16; citing Final Staff Report at V–11 (Table V–2)). The Commission concluded from this evidence that price has become a significant distinguishing characteristic between systems of equal quality. *See* Remand Determination at 20 & n.71.

Furthermore, the Commission pointed to evidence on the record that key terms of supercomputer contracts, including price and performance values, are often disclosed post-sale to other buyers, both commercial and government, leading to an expectation among buyers of a similar low price for the same performance level in future bids. *See* Remand Determination at 16 & nn.59–60. This "lighthouse effect" will have the consequence, as the terms of the UCAR sale become known, of creating an expectation among buyers that similarly performing imports will be offered at that same low price in the future, resulting in further aggressive bidding. *See* Remand Determination at 20. The Commission concluded that the prospect of lower prices for similarly performing products reinforces the imminence of increased imports, *see* discussion *supra* Part 2.a, while "the aggressive pricing of the significant volume of subject imports is likely to suppress domestic prices to a significant degree." *Id.* at 21.

On remand, the Commission addressed the deficiencies of its previous analysis of price effects. It found on the basis of substantial evidence that market conditions have caused price to become a significant factor, and that post-sale communication of bid information will reinforce aggressive pricing trends. The Court thus upholds the Commission's conclusion that aggressively priced imports are likely to depress or suppress domestic prices, and increase demand for subject imports.

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[16] The record indicates aggressive pricing of imported products in three out of five bids for which domestic and foreign producers competed. *See* Final Staff Report at V–27. The domestic producer was forced to lower its prices in at least two of these three instances. *See* Final Staff Report at V–32; Company A Responses at 25.

[17] NEC and Fujitsu challenge the Commission's finding that Japanese supercomputers became competitive with domestic supercomputers only at the end of the period of investigation. *See* NEC Remand Cmts. at 16; Fujitsu Remand Cmts. at 20–21. While some record evidence might indicate that performance parity was reached at an earlier point in time, the Court is persuaded that the Commission provided substantial evidence in support of its conclusion. *See* Remand Determination at 18 & nn.63–64 (citing several confidential Questionnaire responses and Staff Notes).

c. Research and Development

The Commission found that research and development efforts by the domestic industry are threatened by aggressive pricing and increased import volumes of Japanese products. *See* Remand Determination at 12–13. The nature of the industry demands capital-intensive, continuous technical innovation leading toward the next generation product. *See* Remand Determination at 12–13 (citing Cray Pre-Hearing Br. at 28–30); Final Determination at 46. The Commission concluded that aggressive pricing and increased import volumes will make it difficult to pursue next generation products, since the number of and rate of return on successful bids will decline. *See* Remand Determination at 13.

Plaintiff NEC argues that the Commission cannot both claim (1) that the domestic industry is in a better position to compete since a major 1995 restructuring program, and (2) that its research and development efforts are threatened by subject imports. *See* NEC Remand Cmts. at 28–29. Yet the first claim of the Commission plainly does not apply to domestic industries competing with LTFV imports. It is not incompatible to find that the domestic industry is in a better position to compete with fairly-traded imports, and that research and development efforts will be negatively affected by a significant increase of aggressively priced imports. The Commission's conclusion regarding research and development follows from its findings on volume, capacity, pricing, and the nature of research and development in the supercomputer industry. The Court holds that the Commission has cited substantial evidence of a causal connection between subject imports and a potential negative effect on research and development.

d. Other Relevant Economic Factors

As mentioned above, the Commission considered the contribution of "other factors" in its injury determination, and found *no* present material injury. On remand, the Commission reconsidered the effects of these "other factors" with regard to the threat determination. In its first step, the Commission concluded that each of the "other factors," while still contributing to some degree to the threatened injury, will decrease in significance in the future. Thus, the contribution of the "other factors" is no longer so great that the contribution of subject imports must necessarily be minimal. In its second step, the Commission re-evaluated the threat of material harm to the domestic industry. It concluded that "other factors" make the domestic industry vulnerable to the effects of subject imports, such that the contribution of the subject imports to the threat of material injury is more than *de minimis*.

i. Government Spending

The Commission found that government spending will not decline significantly in the future. *See* Remand Determination 9–10. The Court holds, over NEC's objection to the contrary, *see* NEC Remand Cmts. at 9–10, that the record evidence supports this finding. The government market for vector systems is still of substantial volume and value, sug-

gesting that the government has not exited entirely from the supercomputer market. *See* Final Staff Report at II–1, II–3. Further, a drastic drop in government spending occurred between 1994 and 1995; thereafter, government spending increased, though not reaching 1994 levels. *See* Final Staff Report at II–3. While the overall decline in government spending during the period of investigation was severe enough to prevent a finding of material injury, the Commission had substantial evidence upon which to conclude that the future effect of this "other factor" will not be the same as the present effect.[18]

ii. Substitution of Non-Vector for Vector Systems

The Commission found that non-vector systems are not likely to cause significantly greater deterioration of the vector market; thus, demand for vector systems will stabilize, and the domestic industry will be less threatened by non-vector systems in the future. *See* Remand Determination at 10–11. NEC again objects that there is insufficient evidence to support this finding. *See* NEC Remand Cmts. at 10–13. Again the Court disagrees. The market for vector supercomputers did indeed become smaller during the period of investigation, and is not projected to regain its former size. *See* Final Staff Report at II–1 through II–3. There is, however, a "core" group of vector applications, *see* Final Staff Report at II–10 & n.17, for which substitution of a non-vector system is currently technologically and economically impractical. *See* Final Staff Report at II–17. Further, the Commission found, on the basis of record evidence, that the value of vector supercomputers sold in the U.S. increased and then plateaued at the end of the period of investigation, indicating that the deterioration of the vector market may have diminished somewhat. *See* Remand Determination at 10 (citing Final Staff Report at C–3). Finally, the Commission cited anecdotal evidence suggesting that projected demand for vector systems is stable. *See* Remand Determination at 10 (citing Final Staff Report at II–7). The Commission cited sufficient evidence in support of its conclusion that the effects of the substitution of non-vector for vector systems would decline in the future.

iii. Restructuring Program

Cray, the dominant domestic producer, underwent a massive restructuring program during the period of investigation, "partly in response to the reduction and change in demand for supercomputers." Remand Determination at 11. Based on evidence that these restructuring costs had been absorbed by the end of the period of investigation, however, *see* Final Staff Report at VI–4, the Commission found that the restructuring program poses no future threat to the domestic industry. *See* Remand Determination at 11.

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18 This forward-looking approach "is not the same perspective and may not lead to conclusions reached about material injury to the domestic industry now." *Bando*, 17 CIT at 804.

iv. Vulnerability Analysis

The Commission concluded that the "other factors," while continuing to contribute directly to the threat of material injury, also contribute indirectly insofar as they "render the industry vulnerable to material injury by reason of subject imports." *See* Remand Determination at 11. Because of the declining government market, the Commission found that the domestic industry will have to compete directly with subject imports in the commercial market for an increased proportion of its sales. *See id.* at 10; *see also supra*, note 11. Further, competition from non-vector supercomputers has eroded the low to middle end of the market for vector systems. *See* Final Staff Report at I–22 through I–23. Competition between domestic and imported vector supercomputers consequently occurs primarily at the high end of the price range for vector systems. *See id.* The Commission found that, because each high end sale "has a significant impact on the vendor's revenues," this "other factor" renders the domestic industry vulnerable to injury from an increased volume of aggressively priced subject imports. Remand Determination at 12. Finally, following its restructuring program, "[w]hile Cray has positioned itself to better compete in the marketplace, it has little room to counter the aggressive pricing likely to be presented by the subject imports." *See id.* at 12.

As noted above, the Court does not disfavor "vulnerability analysis" per se, provided the Commission conducts an "analysis to distinguish between the contribution to material harm caused by LTFV goods and these economic factors unrelated to the subject imports." *NEC I*, 22 CIT at ____, 36 F. Supp. 2d at 392. On remand, the Commission has provided substantial evidence of the causal connection between the subject imports themselves and the threat of material injury to the domestic industry. While it is critical that the Commission consider the contribution of "other factors" to the threatened injury, as it did here, the Commission should not evaluate the contribution of imports as if the domestic industry existed in a vacuum.

CONCLUSION

The Commission's affirmative determination of threat of material injury is supported by substantial evidence on the administrative record and otherwise supported by law. Accordingly, the Commission's Remand Determination is affirmed.

NOTE: This is to advise that Slip Op. 99–137 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 99–137)

AIMCOR AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA DE FERRO LIGAS DA BAHIA, DEFENDANT-INTERVENORS

Court No. 96–12–02868

(Dated December 17, 1999)

(Slip Op. 99–138)

CUMMINS ENGINE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–04–01274

[Defendant's motion for summary judgment is granted.]

(Decided December 21, 1999)

Barnes, Richardson & Colburn, (Robert E. Burke, Lawrence M. Friedman, and *David G. Forgue)* for Plaintiff.

David W. Ogden, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, *Barbara S. Williams*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel, for Defendant.

OPINION

POGUE, *Judge:* Defendant, the United States, moves for summary judgment pursuant to USCIT Rule 56. Plaintiff, Cummins Engine Company ("Cummins"), opposes Defendant's motion, asserting that summary judgment is not appropriate because genuine issues of material fact exist. Jurisdiction is predicated on 28 U.S.C. § 1581(a)(1994).

BACKGROUND

On December 5th and 28th of 1995, Plaintiff filed protests challenging the decision of the U.S. Customs Service ("Customs") to deny duty-free treatment under the North American Free Trade Agreement ("NAFTA") to certain diesel engine crankshafts that Plaintiff imported from Mexico. Under General Note 12(a)(ii), Harmonized Tariff Schedule of the United States ("HTSUS"), 19 U.S.C. § 1202 (1995), an imported good is eligible for NAFTA preferential duty treatment if it "originate[s] in the territory of a NAFTA party[.]" *See also* 19 U.S.C. § 3332 (1994).

Where a good is not "wholly obtained or produced entirely" in the territory of a NAFTA country, the good must undergo "a change in tariff classification" within the NAFTA country in order to qualify as originating from that NAFTA country. *See* General Note 12(b)(ii), HTSUS.

Here, the production of the imported crankshafts began in Brazil under the operation of Krupp Metalúrgica Campo Limpo, which manufactured crankshaft forgings from alloy steel. Next, Cummins de Mexico, S.A. ("CUMMSA"), a wholly owned subsidiary of Plaintiff, imported the articles into Mexico and further processed them into the finished crankshafts that Plaintiff ultimately imported into the United States.

Upon importation into the United States in June and July of 1995, Customs classified the crankshafts under subheading 8483.10.30, HTSUS (1995), covering other transmission shafts (including camshafts and crankshafts) and cranks, with a duty rate of 3.5% *ad valorem*. Plaintiff argues, however, that Customs should have classified the crankshafts under subheading (MX)8483.10.30, HTSUS,[1] as goods originating from a NAFTA country within the meaning of General Note 12(b)(ii), HTSUS.

According to Plaintiff, the articles were classifiable upon entry into Mexico under heading 7224, HTSUS (1995), as "semifinished products of other alloy steel[.]" Thus, because the articles were further processed within Mexico into finished crankshafts classifiable under subheading 8483.10.30, HTSUS, they underwent the tariff shift required to be deemed goods originating from a NAFTA country under General Note 12(b)(ii), HTSUS. Defendant denies that the goods underwent the required tariff shift, contending that they were already classifiable under subheading 8483.10.30, HTSUS, upon entering Mexico. Thus, the paramount issue before the Court is whether Customs' determination—that the articles were classifiable under subheading 8483.10.30, HTSUS, upon entering Mexico—can be decided as a matter of law.

Plaintiff alleged the following three counts in its complaint: (1) because the crankshafts originate in a NAFTA country for purposes of duty preferences under General Note 12(a)(ii), HTSUS, Plaintiff's imports should be reliquidated as duty-free under NAFTA, *see* Pl.'s Second Am. Compl. ¶¶ 25, 28; (2) because Customs "improperly denied Plaintiff's claims for NAFTA preferential duty treatment prior to its commencement of a NAFTA origin verification as required under 19 C.F.R. § 181.71[,]" Plaintiff's imports should be reliquidated as duty-free under NAFTA, *id.* ¶¶ 31, 33; and (3) because the crankshafts underwent a substantial transformation in Mexico, they should be reliquidated duty-free under NAFTA as products of Mexico within the meaning of 19 U.S.C. § 1304, *see id.* ¶¶ 36, 37. Defendant moves for summary judgment in its favor on all three counts.[2]

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[1] The prefix "MX" indicates that the article is a product of Mexico and thus accorded NAFTA preferential tariff treatment.

[2] Plaintiff moved this Court for an order granting oral argument. Because the issues presented are thoroughly addressed in the parties' briefs, however, Plaintiff's motion is denied.

UNDISPUTED FACTS

This matter involves imports into the United States of diesel engine crankshafts in June and July of 1995. *See* Def.'s Statement of Undisputed Facts ¶ 1.[3] The imported merchandise was exported from Mexico by CUMMSA, a wholly-owned subsidiary of Plaintiff, the importer. See *id.* ¶ 2.

The manufacture of the imported crankshafts began in Brazil with a closed-die forging process, which involves forging between matrices. *See id.* ¶ 3. After cooling, the articles were removed from the dies, and their ends were milled (a machining process) to allow them to be securely clamped into the machines used in the machining operations performed in Mexico. *See id.* ¶ 4; Pl.'s Counterstatement to Def.'s Statement of Undisputed Facts ("Pl.'s Counterstatement") ¶ 1; Def.'s Mem. in Reply to Pl.'s Opp'n to Def.'s Mot. for SJ ("Def.'s Reply") at 4–5. In addition, the articles' mass centers (i.e., centers of balance) were established by machining locator center points on each end. *See* Def.'s Statement of Undisputed Facts ¶ 4. The mass centers were redone in Mexico. *See* Pl.'s Counterstatement ¶ 1; Def.'s Reply at 4–5. Also in Brazil, grease pockets, 50 mm in diameter and 13 mm deep, were machined into the flange ends with a lathe. *See* Def.'s Statement of Undisputed Facts ¶ 5. The design of the finished crankshaft requires a grease pocket. *See id.* Finally, the articles were subjected to shot blasting in Brazil. *See id.* ¶ 6.

As imported into Mexico, the articles possessed the general shapes of crankshafts and were intended for use only as crankshafts. *See id.* ¶ 16. In Mexico, the articles underwent at least fourteen different machining operations, touching 95% of each article's surface. *See* Pl.'s Counterstatement ¶ 2; Def.'s Reply at 4–5. The machining processes performed in Mexico removed up to one-third of the material from certain areas of the articles and between one-third and two-fifths of an inch of steel from other areas. *See* Pl.'s Counterstatement ¶ 2; Def.'s Reply at 4–5.

In response to a letter from Plaintiff dated June 23, 1995, Customs issued an advance ruling, NY 811617 (July 27, 1995), pursuant to 19 C.F.R. § 181.92 (1995), which notified Plaintiff that the imported crankshafts were not entitled to NAFTA duty preference. *See* Def.'s Statement of Undisputed Facts ¶ 17. After Plaintiff's initiation of this action in this Court, Customs conducted an origin verification pursuant to 19 C.F.R. § 181.72 (1995), which confirmed Customs' earlier findings set forth in NY 811617. *See id.*

STANDARD OF REVIEW

Pursuant to USCIT Rule 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT Rule 56(d); *see also Anderson v.*

[3] A party moving for summary judgment must submit to this court a "concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." USCIT Rule 56(i). "All material facts set forth in the statement * * * will be deemed to be admitted unless controverted * * * by the opposing party." *Id.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In considering whether material facts are in dispute, the Court must consider the evidence in a light most favorable to the non-moving party, drawing all reasonable inferences in its favor, as well as all doubts over factual issues. *See Anderson*, 477 U.S. at 255; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Nevertheless, "[w]hen a motion for summary judgment is made and supported * * *, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but * * * must set forth specific facts showing that there is a genuine issue for trial." USCIT Rule 56(f).

Count I of Plaintiff's complaint requires the Court to apply the NAFTA origination rules. In doing so, the Court must review Customs' classification of the articles upon their entry into Mexico as crankshafts under subheading 8483.10.30, HTSUS. The Court analyzes a classification issue in two steps: "first, [it] construe[s] the relevant classification headings; and second, [it] determine[s] under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998)(citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)). Whether the merchandise is properly classified is ultimately a question of law.[4] *See id.* Summary judgment is therefore appropriate "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Id.*

Discussion

I. The NAFTA Origination Rules

The HTSUS consists of (A) the General Notes; (B) the General Rules of Interpretation; (C) the Additional U.S. Rules of Interpretation; (D) sections I to XXII, inclusive (encompassing chapters 1 to 99, and in-

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[4] The Supreme Court's recent holding in *United States v. Haggar Apparel Co.*, 526 U.S. ____, 67 U.S.L.W. 4249 (U.S. Apr. 21, 1999), raised questions concerning the standard of review applicable to Customs' interpretation of the meaning and scope of tariff terms. *See Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999). In *Haggar*, the Supreme Court held that if an HTSUS provision is ambiguous and Customs promulgates a regulation that fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, courts should afford the interpretation the deference articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *Haggar*, 526 U.S. at ____, 67 U.S.L.W. at 4252–53.

In *The Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999), however, the Federal Circuit held that *Haggar* does not apply where Customs "merely issue[s] a classification ruling implicitly interpreting an HTSUS provision." 185 F.3d at 1307. Recognizing *Mead*, Defendant nevertheless argues that its legal interpretations of the tariff schedule here should be accorded *Chevron* deference. *See* Def.'s Reply at 2 n.2. The Court disagrees.

Specifically, in *Mead*, the Federal Circuit declined to grant *Chevron* deference to a Customs ruling issued under 19 C.F.R. §§ 177.0–177.12 (1998). *See Mead*, 185 F.3d at 1307. The court explained that such rulings "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review. Instead, a ruling merely interprets and applies Customs laws to a 'specific set of facts.'" *Id.* (citing 19 C.F.R. § 177.1(d)(1) (defining "ruling")); *see also* 1 Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5 (1994)(discussing the scope of *Chevron*); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1 (1990)(arguing that an agency's legal interpretation in a formal format, such as a legislative regulation, should be afforded *Chevron* deference, but that an agency's legal interpretation in a less formal format, such as a letter or guideline, should not be afforded *Chevron* deference).

Here, Customs issued a NAFTA advance ruling pursuant to 19 C.F.R. § 181.99 (1995), determining that the imported crankshafts did not originate in a NAFTA country. *See* NY 811617 (July 27, 1995). Similar to Customs classification rulings under 19 C.F.R. 177.0, NAFTA advance rulings are neither precedential nor carry the force of law, *see* 19 C.F.R. § 181.100(3)(1995), but merely apply the NAFTA laws to a "specific set of facts," *see* 19 C.F.R. § 181.92 (1995). Therefore, the principles denying *Chevron* deference to standard Customs rulings in *Mead* apply with equal force to the NAFTA advance ruling issued here. The Court will not afford *Chevron* deference to the legal interpretations of the HTSUS articulated in Customs' negative origin determination.

cluding all section and chapter notes, article provisions, and tariff and other treatment accorded thereto); and (E) the Chemical Appendix.

The proper classification of merchandise is governed by the General Rules of Interpretation ("GRI") to the HTSUS. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). GRI 1 provides that, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." GRI 1, HTSUS; *see also Orlando Food Corp.*, 140 F.3d at 1440; Harmonized Commodity Description and Coding System, Explanatory Notes (1st ed. 1986)("Explanatory Notes") at 1 ("[T]he terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification.").[5]

In reviewing whether the subject goods underwent a tariff shift in Mexico as required by General Note 12(b)(ii), HTSUS, the Court must determine whether Customs' decision that the subject articles were covered by subheading 8483.10.30, HTSUS, upon importation into Mexico is correct as a matter of law. Plaintiff argues that this dispute requires resolution of genuine issues of fact and that, therefore, summary judgment is not appropriate. Plaintiff maintains that the articles were classifiable under heading 7224, HTSUS, upon importation into Mexico.

Note 1(f) to Section XV, HTSUS (1995)(which includes Chapter 72), states that the section does not cover articles of Section XVI, HTSUS (1995)(which includes Chapter 84). Therefore, Defendant counters that, if the articles were covered by subheading 8483.10.30, HTSUS, upon importation into Mexico, they must be classified as such, even if they were also classifiable under heading 7224, HTSUS. *See* Def.'s Reply at 2.

Defendant relies on GRI 2(a) in arguing that the articles were classifiable under subheading 8483.10.30, HTSUS, upon entering Mexico. *See* Mem. in Supp. of Def.'s Mot. for SJ at 19–20. That rule provides, "Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article." GRI 2(a). Defendant contends the articles possessed the "essential character" of a complete or finished crankshaft upon entering Mexico; therefore, they were at that time classifiable under subheading 8483.10.30, HTSUS, as unfinished crankshafts. *See* Mem. in Supp. of Mot. for SJ at 20.

Although the articles at issue may indeed have been classifiable as Defendant maintains, the Explanatory Note to GRI 2(a) provides,

> The provisions of [GRI 2(a)] also apply to blanks unless these are specified in a particular heading. The term "blank" means an article, not ready for direct use, having the approximate shape or out-

[5] The Explanatory Notes "provide a commentary on the scope of each heading of the Harmonized [Tariff] System and are thus useful in ascertaining the classification of merchandise under the system." H.R. Conf. Rep. No. 576, 100th Cong., 2nd Sess. 549 (1988). It has long been settled that, "[w]hile the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS[US] subheadings." *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

> line of the finished article * * *, and which can only be used, other than in exceptional cases, for completion into the finished article * * *. Semi-manufactures not yet having the essential shape of the finished articles * * * are not regarded as "blanks."

Explanatory Notes at 2.

Here, it is undisputed that the articles upon importation into Mexico had the general shape of crankshafts and were intended for use solely as crankshafts. *See* Def.'s Statement of Undisputed Facts ¶ 16. Therefore, interpreting the undisputed facts in a light most favorable to the non-moving party, the Court infers that the articles were "blanks" within the meaning of the Explanatory Note to GRI 2(a). Consequently, if, upon entering Mexico, the Plaintiff's goods could have been provided for elsewhere as blanks, then they were not correctly classified under subheading 8483.10.30, HTSUS, as a matter of law. Thus, despite Section XV, Note 1(f), the Court must first address whether the articles were classifiable under heading 7224, HTSUS.

A) Heading 7224, HTSUS

Heading 7224, HTSUS, covers "semifinished products of other alloy steel." Chapter 72, Note 1(ij), HTSUS (1995), defines "semifinished products" as "[o]ther products of solid section, which have not been further worked than * * * roughly shaped by forging, including blanks for angles, shapes or sections." Chapter 72, Note 1 (ij) expressly covers blanks. Therefore, in reviewing whether the subject imports were classifiable under heading 7224, HTSUS, upon entering Mexico, the Court must address whether at that time they were "not * * * further worked than * * * roughly shaped by forging," so as to constitute a blank.

Chapter 72, U.S. Additional Note 2, HTSUS (1995), states,

> For the purposes of this chapter, unless the context provides otherwise, the term "*further worked*" refers to products subjected to any of the following surface treatments: polishing and burnishing; artificial oxidation; chemical surface treatments such as phosphatizing, oxalating and borating; coating with metal; coating with nonmetallic substances (e.g., enameling, varnishing, lacquering, painting, coating with plastics materials); or cladding.

Plaintiff argues that, because it is undisputed that the articles had not undergone any of the processes listed above in Brazil, they were not "further worked" within the meaning of Chapter 72 before entering Mexico. *See* Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ at 10–11. The definition of "further worked," however, is not limited to the note's listed surface treatments. U.S. Additional Note 2 expressly states that the term "further worked" constitutes the listed surface treatments "unless the context provides otherwise[.]" Chapter 72, U.S. Additional Note 2, HTSUS. In this case, the context provides otherwise.

Chapter 72, Note 1(ij), HTSUS, defines "semifinished products of other alloy steel" as products that have "not been further worked *than* * * * *roughly shaped by forging*[.]" To read "further worked" as limited to surface treatments would render unnecessary the subsequent qualify-

ing language, "than * * * roughly shaped by forging." The Court "should construe the statute, if at all possible, to give effect and meaning to all the terms." *Bausch & Lomb*, 148 F.3d at 1367 (citing *United States v. Menasche*, 348 U.S. 528, 539 (1955)). Therefore, in this context, the term "further worked" is more appropriately defined by its common meaning, which is "to form, fashion, or shape an existing product to a greater extent." *Winter-Wolff, Inc. v. United States*, 22 CIT ___, ___, 996 F. Supp. 1258, 1265 (1998) (determining that "further worked" as used in heading 7607, HTSUS, should be defined in accordance with its common meaning).[6]

As previously noted, it is undisputed that in Brazil: (1) the articles were subjected to shot blasting, *see* Def.'s Statement of Undisputed Facts ¶ 6; (2) the articles' mass centers were established by machining locator center points on each end, *see id.* ¶ 4; and (3) grease pockets were machined into the articles' flanged ends with a lathe, *see id.* ¶ 5. Defendant argues that these processes demonstrate that the articles were "further worked than * * * roughly shaped by forging" in Brazil, and therefore, the articles did not enter Mexico as "semifinished products of other alloy steel" within the meaning of heading 7224, HTSUS. *See* Mem. in Supp. of Def.'s Mot. for SJ at 8–9.

Shot blasting is the use of abrasive particles to strike and to remove dirt and oxide from the surface of a metal workpiece. *See* Dep. of Robert D. Kraft at 63 (Ex. B to Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ). Interpreting this evidence in a light most favorable to the non-moving party, it is possible to infer that shot blasting does not constitute "further work" because it does not appear to form, fashion, or shape the article to a greater extent. *See Winter-Wolff*, 22 CIT at ___, 996 F. Supp. at 1265.

Regarding the mass centering, it appears that the articles were center marked in Brazil so that they could be properly positioned in the machinery that further shaped the articles in Mexico, *see* Pl.'s Resp. to Def.'s First Interrogs., No. 11(b)(7) (Ex. D to Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ), and it is undisputed that the mass centers were redone in Mexico, *see* Pl.'s Counterstatement ¶ 1; Def.'s Reply at 4–5. Thus, it is reasonably inferable that the mass centering was inciden-

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[6] Defendant cites various cases decided under analogous prior tariff provisions in support of its argument that the articles were "further worked" within the meaning of Chapter 72, Note 1(ij), HTSUS. *See* Mem. in Supp. of Def.'s Mot. for SJ at 10–11 (citing *United States v. Anderson & Co.*, 2 Ct. Cust. 350 (1911); *Edward W. Daniel Co. v. United States*, 67 Cust. Ct. 132 (1971); *Ford Motor Co. v. United States*, 19 C.C.P.A. 69 (1931); *W.R. Filbin & Co., Inc. v. United States*, 63 Cust. Ct. 200, 306 F. Supp. 440 (1969); *E. Dillingham, Inc. v. United States*, 61 Cust. Ct. 33 (1968)). Each of the cited cases reviewed one of the following prior tariff provisions: (1) Tariff Schedules of the United States ("TSUS") Item 608.25, TSUS (1967), which provided for forgings "not machined, not tooled, and not otherwise processed after forging"; (2) Paragraph 319(a) of the Tariff Act of 1930, which provided for forgings "not machined, tooled, or otherwise advanced in condition by any process or operation subsequent to the forging process"; (3) Paragraph 123 of the Tariff Act of 1909, which provided for forgings "not machined, tooled, or otherwise advanced in condition by any process or operation subsequent to the forging process[.]"

"Where the text of a tariff provision has undergone only minor changes from the TSUS to the HTSUS, the high values of uniformity and predictability * * * counsel courts to credit prior decisions interpreting the TSUS provision." *Hewlett-Packard Co. v. United States*, 189 F.3d 1346, 1349 (Fed. Cir. 1999)(citing *Pima Western, Inc. v. United States*, 20 CIT 110, 116–17, 915 F. Supp. 399, 404–05 (1996); H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 515, 549–50 (1988)). Here, however, the language of Chapter 72, Note (ij), HTSUS, is significantly different than that used in the prior provisions. Therefore, Defendant's cited cases are not determinative of the matter at hand. *See Mitsubishi Int'l Corp. v. United States*, 182 F.3d 884, 886 (Fed. Cir. 1999)(holding that a judgment interpreting provisions of the TSUS "does not apply to classifications made under differing language of the more recently enacted HTSUS").

tal—rather than further work—as it was performed merely in preparation for further shaping and not to effect the final shape of the product.

It is undisputed, however, that the grease pocket machined into the article in Brazil is 50 mm in diameter and 13 mm deep; is not redone, processed, or touched in any way in Mexico; and "exists for the use of the finished crankshaft in a vehicle." Def.'s Statement of Undisputed Facts ¶ 5. The machining of the grease pocket, therefore, literally meets the common meaning of "further work," as it alters the shape of the article to a greater extent, particularly since the grease pocket is designed for use in the completed crankshaft.

"Even when merchandise falls within the literal language of the statute, however, such literal interpretation should be rejected if it produces a result contrary to the apparent legislative intent." *Chevron Chemical Co. v. United States*, 23 CIT ___, ___, 59 F. Supp.2d 1361, 1365 (1999)(citing *Procter & Gamble Mfg. Co. v. United States*, 19 C.C.P.A. 415, 419 (1932)); *see also EM Indus., Inc. v. United States*, 22 CIT ___, ___, 999 F. Supp. 1473, 1478–79 (1998)("While construing a statute so as to carry out the legislative intent requires that the court first look to the statutory language itself, * * *, that does not mean * * * the court is foreclosed from also considering readily available guidance from the Explanatory Notes as to the intended scope of subheadings.")(citation omitted).

The precise issue is whether the machining of the grease pocket constitutes further work than "roughly shaped by forging" upon entering Mexico. The Explanatory Note defines "pieces roughly shaped by forging" as follows:

> These are semi-finished products of rough appearance and large dimensional tolerances, produced from blocks or ingots by the action of power hammers or forging presses. They may take the form of crude recognisable [sic] shapes in order that the final article can be fabricated without excessive waste, but the heading covers ONLY those pieces which require considerable further shaping in the forge, press, lathe, etc. The heading would, for example, cover an ingot roughly hammered into the shape of a flattened zig-zag and requiring further shaping to produce a marine crankshaft, but it would NOT COVER a crankshaft forging ready for final machining. The heading similarly EXCLUDES drop forgings and pressings produced by forging between matrices since the articles produced by these operations are ready for final machining.

Explanatory Note 72.07(B) at 992.[7]

Pointing to the last sentence of the Explanatory Note, Defendant argues that, because it is undisputed that the articles as imported into Mexico were "pressings produced by forging between matrices," a closed-die forging operation, the plain language of the Explanatory Note excludes the articles from heading 7224. *See* Mem. in Supp. of Def.'s Mot. for SJ at 13. The subsequent qualifying language, however, is more

[7] The Explanatory Note to heading 7224, HTSUS, explains that the provisions of the Explanatory Note to heading 7207, HTSUS, apply, *mutatis mutandis*, to the products of heading 7224, HTSUS. *See* Explanatory Note 72.24 at 1010.

instructive. That language provides that the heading excludes these types of forgings "since the articles produced by these operations are *ready for final machining.*" Explanatory Note 72.07(B) at 992 (emphasis added).

Neither the HTSUS nor its legislative history expressly defines "final machining." Defendant argues that "final machining" as used in the Explanatory Note "means the less significant machining done on forgings created by closed-die or drop forging processes." Def.'s Mem. in Supp. of Def.'s Mot. for SJ at 15. Accordingly, Defendant contends the Explanatory Note explains that heading 7224 covers only articles produced by open-die forging, excluding those produced by closed-die and drop forging. *See id.* at 17–18. Because it is undisputed that the articles here were produced by closed-die forging in Brazil, Defendant argues that they were "ready for final machining" upon entering Mexico and were therefore not classifiable under heading 7224, HTSUS.

Defendant's argument has some appeal. Open-die forging has been defined as "[t]he hot mechanical forming of metals between flat or shaped dies in which metal flow is not completely restricted." *Metals Handbook, Vol. 14 Forming and Forging* 9 (Joseph R. Davis ed., 9th ed. 1988). An open-die forging "require[s] significant machining to achieve a finished part." *Handbook of Manufacturing Engineering* 721 (Jack M. Walker ed., 1996).

Closed-die forging has been defined as "[t]he shaping of hot metal completely within the walls of cavities of two dies that come together to enclose the workpiece on all sides." *Metals Handbook, Vol. 14 Forming and Forging* 2 (Joseph R. Davis ed., 9th ed. 1988). "With the use of closed dies, complex shapes and heavy reductions can be made in hot metal within closer dimensional tolerances than are usually feasible with open dies." *Id.* at 75. Unlike open-die forgings, "[c]losed-die forgings are usually designed to require minimal subsequent machining." *Id.*

Finally, drop forging has been defined as "[t]he forging obtained by hammering metal in a pair of closed dies to produce the form in the finishing impression under a drop hammer[.]" *Id.* at 5. Drop forging is used "where precise dimensions are required[.]" *Van Nostrand's Scientific Encyclopedia* 1611 (Douglas M. Considine ed., 7th ed. 1989).

Under Defendant's theory, "pressings produced by forging between matrices" refers to closed-die forging. Thus, because drop forging produces precise dimensions and closed-die forging usually requires minimal subsequent machining, Defendant argues that "final machining" in the context of the Explanatory Note means "the less significant machining required after closed-die or drop forging." Mem. in Supp. of Def.'s Mot. for SJ at 19. It is undisputed that the articles were produced by closed-die forging in Brazil; thus, Defendant concludes the articles were not classifiable under heading 7224, HTSUS, upon importation into Mexico.

There are, however, two main flaws with Defendant's proferred definition of "final machining." First, open-die forgings are also produced

between matrices, i.e., dies. *See Metals Handbook, Vol. 14 Forming and Forging* 9, 61 (Joseph R. Davis ed., 9th ed. 1988). Therefore, it is not clear that the Explanatory Note's use of "pressings produced by forging between matrices" was intended only to refer to closed-die forgings. Second, although closed-die forging generally produces pieces that require only minimal subsequent machining, this is not always the case. *See id.* at 75. ("Closed-die forgings are *usually* designed to require minimal subsequent machining.")(emphasis added). Thus, because it is not clear that "final machining" was intended to be limited to the type of machining following closed-die and drop forging processes, the Court declines to adopt Defendant's definition of the term.

Alternatively, Plaintiff—citing the depositions of two industry representatives—contends that "final machining" is analogous to "finish machining," which is known in the industry as the machining step that creates the final shape, size, and surface finish of an article. *See* Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ at 15; Pl.'s Statement of Facts as to Which There Is a Genuine Issue of Material Fact ¶ 3.

"When a tariff term is not defined in the HTSUS or its legislative history, the term's correct meaning is its common meaning." *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1374 (Fed. Cir. 1999)(citing *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)). In ascertaining the common meaning of a tariff term, "the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988). Although here the term "final machining" appears in the Explanatory Notes, and not the tariff provision, the same analysis serves as an appropriate guideline.

"Final" is defined as: "1. Forming or occurring at the end: LAST[;] 2. Of, relating to, or constituting the last element in a series, process, or procedure." *Webster's II, New Riverside University Dictionary* 478 (1988). In the context of metal-working, "machining" is defined as: "Any one of a group of operations that change the shape, surface finish, or mechanical properties of a [metal workpiece] by the application of special tools and equipment. Machining almost always is a process where a cutting tool removes material to effect the desired change in the workpiece." 10 *McGraw-Hill Encyclopedia of Science & Technology* 275 (8th ed. 1997); *accord Handbook of Manufacturing Engineering* 52 (Jack M. Walker ed., 1996). Thus, the Court construes the common meaning of "final machining" as the end or last step in a series of steps changing the shape, surface finish, or mechanical properties of a piece of metal.

This definition of final machining is consistent with the Explanatory Note's more general instruction that "the heading covers ONLY those pieces which require considerable further shaping in the forge, press, lathe, etc." Explanatory Note 72.07(B) at 992. A lathe is a machine tool that changes the shape, finish, or size of a piece of metal by cutting off chips. *See Handbook of Manufacturing Engineering* 53 (Jack M. Walker

ed., 1996). Therefore, by including the lathe in its list of tools that may considerably further shape the metal workpiece—as well as by the use of "etc."—the Explanatory Note indicates that the definition of "pieces roughly shaped by forging" includes pieces that require considerable further shaping by machining. Those pieces that merely require the last stage of modifying the article's shape by machining, i.e., final machining, are excluded.

Moreover, this line of the Explanatory Note is more instructive because it sets out a general rule for determining whether a metal workpiece is merely "roughly shaped by forging." Thus, employing the definition set out in Explanatory Note 72.07(B), for metal pieces to be deemed "roughly shaped by forging," it is paramount that they "require considerable further shaping in the forge, press, lathe, etc.[,]" being of "rough appearance and large dimensional tolerances[.]" Consistently, Chapter Note 1(ij) indicates that blanks, which have "the approximate shape or outline of the finished article[,]" *see* Explanatory Notes at 2, are an example of pieces that have not been further worked than roughly shaped by forging.

As required by USCIT Rule 56(f), Plaintiff has "set forth specific facts showing that there is a genuine issue" regarding whether the articles, upon their entry into Mexico, required considerable further shaping and exhibited rough appearances and large dimensional tolerances.

Regarding whether the articles still required considerable shaping upon entering Mexico, Plaintiff claims that the articles underwent fourteen different machining operations in Mexico covering 95% of each article's surface area. *See* Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ at 3, 12 (citing Dep. of Contreras at 89–90, Ex. C). Plaintiff also states that the machining in Mexico removed up to one-third of the material from certain areas of each article and between one-third and two-fifths of an inch of steel from other areas.[8] *See* Pl.'s Counterstatement ¶ 2 (citing Dep. of Kraft, Ex. B). Finally, Plaintiff explains that approximately 21% of the mass of each article was removed in Mexico. *See* Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ at 3 (citing Dep. of Contreras at 81–82, Ex. C). Each of these facts also supports a finding that the articles were of "rough appearance" upon entering Mexico.

Tolerances measure the accuracy of the metal workpiece's dimensions. *See Handbook of Manufacturing Engineering* 100 (Jack M. Walker ed., 1996). A "near-net-shape" forging exhibits close dimensional tolerances and requires little, if any, subsequent machining to achieve the finished product. *See id.* Plaintiff claims that, before entering Mexico, the articles had "tolerances on the order of 254 microns in total tolerance on the forging diameters." Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ at 9 (citing Dep. of Contreras at 51, Ex. C). Within Mexico, their surfaces were "machined to within 26 microns in total tolerance on these same diameters." *Id.* This approximately tenfold ratio of tolerances between

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[8] Each of the foregoing facts is undisputed.

the article prior to entry in Mexico and the finished product supports a finding that the articles exhibited "large tolerances" upon entering Mexico.

Defendant concedes that Plaintiff has put forth evidence supporting these points, but argues that summary judgment is nevertheless appropriate because they are not material. The Court agrees. Plaintiff may be able to prove at trial that each article required considerable further shaping upon entering Mexico. Nevertheless, the undisputed fact that a grease pocket was machined into the article in Brazil indicates that it was "further worked than * * * roughly shaped by forging" within the meaning of Chapter 72 Note (ij) because the machining of the grease pocket constituted the first step toward accomplishing the considerable further shaping. Therefore, the subject articles were not classifiable as "semifinished products of other alloy steel" under heading 7224, HTSUS, as a matter of law.

B) Heading 8483, HTSUS

Having held that the articles were not classifiable under heading 7224, HTSUS, upon entry into Mexico, the Court reviews whether they were classifiable as unfinished crankshafts under subheading 8483.10.30, HTSUS, as Defendant maintains. As previously noted, Defendant relies on GRI 2(a) in arguing that the articles were classifiable under subheading 8483.10.30, HTSUS, upon entry into Mexico. *See* Mem. in Supp. of Def.'s Mot. for SJ at 19–20. That rule states, "Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article." GRI 2(a).

Defendant argues the articles had the essential character of crankshafts upon entry into Mexico "as it is uncontested that [they were] the actual bod[ies] of the crankshaft[s], [were] intended for use only as crankshafts, [had] the general shape[s] of the imported crankshafts, and nothing [was] added in Mexico to the [articles] to make them finished crankshafts." Mem. in Supp. of Def.'s Mot. for SJ at 20. Plaintiff counters that the "four factors cited by Defendant as those imparting the essential character to the rough forgings in question are simply not relevant." Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ at 17. In addition, Plaintiff argues that Defendant's classification fails to take into account numerous essential characteristics of a finished crankshaft that the subject articles lacked upon entering Mexico: surface condition, final balance, and hardness. *See id.* at 19–20.

As previously noted, however, the Explanatory Note to GRI 2(a) states,

> The provisions of [GRI 2(a)] also apply to blanks unless these are specified in a particular heading. The term "blank" means an article, not ready for direct use, having the approximate shape or outline of the finished article * * *, and which can only be used, other

> than in exceptional cases, for completion into the finished article * * *.

Explanatory Notes at 2. Here, it is undisputed that the articles upon importation into Mexico had the general shape of crankshafts and were intended for use solely as crankshafts. *See* Def.'s Statement of Undisputed Facts ¶ 16. Pursuant to the Explanatory Note, then, the subject articles were at least blanks upon entering Mexico. Therefore, employing GRI 2(a), because the articles were not provided for elsewhere in the HTSUS as blanks, Customs correctly determined that they were classifiable under subheading 8483.10.30, HTSUS, as unfinished crankshafts upon entering Mexico.[9]

C) Conclusion

Because the subject articles were classifiable under subheading 8483.10.30, HTSUS, upon entering and departing Mexico, Customs properly determined that they did not undergo a change in tariff classification in Mexico within the meaning of General Note 12(b)(ii), HTSUS. Thus, the articles did not qualify as originating in the territory of a NAFTA party. The Court grants Defendant's motion for summary judgment on this issue.

II. Customs' Failure to Conduct a Timely Origin Verification

Customs regulations provide,

> Except where a Certificate of Origin either is not submitted when requested * * * or is not acceptable * * *, Customs shall deny or withhold preferential tariff treatment on an imported good * * * only after initiation of an origin verification * * * which results in a determination that the imported good does not qualify as an originating good or should not be accorded such treatment for any other reason as specifically provided for elsewhere in this part.

19 C.F.R. § 181.71 (1995). Here, however, although Plaintiff submitted a Certificate of Origin,[10] Customs did not conduct an origin verification, as prescribed in 19 C.F.R. § 181.72 (1995), before denying the imported crankshafts NAFTA preferential treatment.

Instead, Customs denied Plaintiff's claim for NAFTA preferential tariff treatment in an advance ruling issued pursuant to 19 C.F.R. §§ 181.91–181.102 (1995). *See* NY 811617 (July 27, 1995). The imported crankshafts entered the United States in June and July of 1995. By letter dated June 23, 1995, Plaintiff requested a ruling on whether the crankshafts qualified for NAFTA preferential treatment. In response,

[9] The conclusion that the articles were properly classifiable under heading 8483, HTSUS, as unfinished crankshafts is bolstered by the General Notes to Sub-Chapter IV of Chapter 72, HTSUS, which covers heading 7224, HTSUS. *See* Explanatory Notes at 1009. The General Explanatory Notes instruct that semifinished products of other alloy steel under heading 7224, HTSUS, "may be worked provided that they do not thereby assume the character of articles or of products falling in other headings[.]" *Id.*

[10] A Certificate of Origin is a document certifying that a "good being exported * * * from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA." 19 C.F.R. § 181.11 (1995). To claim NAFTA preferential treatment, the U.S. importer must "make a written declaration that the good qualifies for such treatment * * * based on a complete * * * Certificate of Origin[.]" 19 C.F.R. § 181.21 (1995). Here, it is apparent that Plaintiff based its claim for NAFTA preferential treatment on a properly executed Certificate of Origin. *See* Def.'s Mem. in Supp. of Mot. for Remand to Customs and to Extend Time in Which Def.'s Response to the Complaint Is Due, Ex. A.

Customs issued its advance ruling on July 27, 1995, determining that the crankshafts did not qualify as "goods originating in the territory of a NAFTA party" within the meaning of General Note 12(b)(ii), HTSUS. Subsequently, Customs liquidated the goods, classifying them under subheading 8483.10.30, HTSUS, with a duty rate of 3.5% *ad valorem*. Plaintiff protested the liquidations in December of 1995. After Customs denied the protests, Plaintiff commenced the instant action by filing a summons on April 25, 1996.

Some time after the filing of Plaintiff's action, Customs realized that it had failed to conduct an origin verification pursuant to 19 C.F.R. § 181.71 before denying Plaintiff's goods NAFTA preferential treatment. Thus, Defendant moved for remand to allow it to cure the procedural error. This Court granted Defendant's Motion for Remand on April 22, 1997, and Customs conducted the verification. Upon completion of the verification, Customs again determined that Plaintiff's crankshafts did not qualify as originating goods under General Note 12(b)(ii), HTSUS. Therefore, this action resumed.

In the second count of its amended complaint, Plaintiff claims, "In the absence of a timely origin verification, 19 C.F.R. § 181.71 requires that Customs liquidate merchandise claimed as NAFTA originating at the NAFTA rate of duty." Pl.'s Second Am. Compl. ¶ 30. Moving for summary judgment, Defendant counters that NAFTA verification conducted after commencement of this action does not entitle the imported crankshafts to duty-free entry as a matter of law. *See* Mem. in Supp. of Def.'s Mot. for SJ at 21. Because Plaintiff does not controvert any of the material facts set forth by Defendant, this Court finds that it is appropriate to resolve this issue by summary judgment. *See* USCIT Rule 56(i).

"As a general rule, an agency is required to comply with its own regulations." *Kemira Fibres OY v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995). Here, however, neither the statute nor the regulation specifies the consequence of noncompliance. Therefore, this Court must decide whether Customs' failure to conduct a timely origin verification automatically affords the subject imports NAFTA preferential treatment.

"There is no question that when a government agency acts 'without observance of procedure required by law,' courts have the power to set aside that action." *Sea-Land Service, Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990)(citations omitted), *aff'd*, 923 F.2d 838 (Fed. Cir. 1991). In reviewing an agency's procedural error for which the law does not prescribe a consequence, however, it is well settled that principles of harmless error apply. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996). The judicial review section of the Administrative Procedure Act, 5 U.S.C. § 706 (1994), instructs that, in reviewing an agency's procedural actions, "'due account shall be taken of the rule of prejudicial error.'" *Id.* (citing 5 U.S.C. § 706). Under the rule of prejudicial error, or harmless error analysis, the Court will not overturn an agency's action "if the procedural error complained of was harmless." *Barnhart v. United States*, 7 CIT 295, 302, 588 F. Supp. 1432,

1437 (1984). "The burden to demonstrate prejudicial error is on the party claiming the error was prejudicial." *Id.*; *see also Kemira Fibres*, 61 F.3d at 875.

Plaintiff, however, does not allege that it was prejudiced by Customs' failure to conduct a timely origin verification. Rather, Plaintiff raises three policy arguments as to why Defendant's procedural error should automatically render its denial of NAFTA preferential treatment void. Plaintiff argues that, if this Court does not void Customs' denial of duty-free treatment: (1) 19 C.F.R. § 181.71 would no longer have the force and effect of law; (2) there would likely be reciprocal non-enforcement of the provision by Canada and Mexico; and (3) judicial efficiency would be impeded because NAFTA claimants would have to bring court actions to make Customs conduct origin verifications. *See* Pl.'s Mem. in Opp'n to Def.'s Mot. for SJ at 22.

Although this Court is mindful of Plaintiff's justifiable concerns, the Court will not overturn Customs' action without a showing that Plaintiff was prejudiced by Customs' procedural error in this case. *See NLRB v. Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir. 1967)(explaining that each case must be determined on its individual facts and, if errors are deemed minor, administrative orders should remain in force notwithstanding). The Court does not condone Customs' failure to conduct a timely origin verification. Nevertheless, because Plaintiff is unable to demonstrate that it was harmed, the Court will not void Customs' finding that the crankshafts were not NAFTA originating goods within the meaning of General Note 12(b)(ii), HTSUS. In any event, the circumstances of this case indicate that Plaintiff was not actually prejudiced.

"Prejudice, [for purposes of harmless error analysis], means injury to an interest that the statute, regulation[,] or rule in question was designed to protect." *Intercargo*, 83 F.3d at 396. A review of the NAFTA Agreement and its legislative history indicates that a primary purpose of the origin verification is to afford the importer notice prior to liquidation as to whether its imports would qualify as NAFTA originating goods. *See* NAFTA Agreement, Article 506 ¶ 11, *reprinted in* 1 *North American Free Trade Agreements: Treaty Materials* Booklet 3 (James R. Holbein and Donald J. Musch eds., 1994)("*NAFTA: Treaty Materials*"); NAFTA Statement of Administrative Action ("NAFTA SAA") at 49 ("A determination by the customs authorities of the importing country that particular goods do not meet NAFTA's rules of origin * * * does not become effective until those authorities notify in writing both the importer and the person that completed the certificate of origin."), *reprinted in* 1 *NAFTA: Treaty Materials* Booklet 8; Uniform Regulations for the Interpretation, Application, and Administration of Chapters Three and Five of the NAFTA ("Uniform Regulations"), Article VI ¶¶ 19 & 20, *reprinted in* 2 *NAFTA: Treaty Materials* Booklet 29. In addition, NAFTA affords the importer the right to administrative and judicial review of determinations resulting from origin verifications. *See* NAFTA Agree-

ment, Article 510; NAFTA SAA at 51–52; Uniform Regulations, Article VIII.

Here, although Customs did not conduct an origin verification prior to denying Plaintiff's goods preferential treatment, it did review and determine whether the goods qualified as NAFTA originating goods in its advance ruling, NY 811617 (July 27, 1995), prior to liquidation. An advance ruling may address "[w]hether a good qualifies as an originating good under General Note 12, HTSUS[.]" 19 C.F.R. § 181.92(6)(v). Customs issued the advance ruling on July 27, 1995, and liquidated Plaintiff's imports the following September, October, and November. Thus, prior to liquidation, Plaintiff had notice as to how Customs would treat its imports. *See* 19 C.F.R. § 181.100(a)(1) & (a)(2)(ii) ("An advance ruling letter issued by Customs * * * represents the official position of Customs with respect to the particular transaction or issue described therein and is binding" with respect to both the subject articles and all identical articles.). Finally, an importer has the right to administrative and judicial review of an advance ruling. *See* 19 C.F.R. § 181.102. Therefore, although Customs did not conduct a timely origin verification, it did determine whether Plaintiff's crankshafts qualified as NAFTA originating goods in a manner that afforded Plaintiff both timely notice and the right to judicial review. These circumstances indicate that Plaintiff was not prejudiced.

Second, Customs on its own recognized the procedural error and, upon voluntary remand, conducted a complete origin verification pursuant to 19 C.F.R. § 181.72. In so doing, Customs acknowledged that it would reverse its earlier position if it found that Plaintiff's goods indeed qualified as originating in a NAFTA territory. Therefore, although Customs did not conduct the verification until after the commencement of this action, it *sua sponte* recognized the problem and remedied it, affording Plaintiff a meaningful verification. Because Plaintiff itself did not recognize the procedural error, and the eventual verification merely confirmed Customs' earlier finding, it is difficult to see how Plaintiff could have been prejudiced.

In sum, Plaintiff fails to demonstrate how it was prejudiced by Customs' failure to conduct a timely origin verification, and the circumstances of this case indicate that Plaintiff was indeed not prejudiced. Therefore, applying the harmless error analysis, this Court will not void Customs' liquidation of the crankshafts as non-originating under NAFTA. The Court grants Defendant's motion for summary judgment on this issue.

III. The Substantial Transformation Test

The marking provision, 19 U.S.C. § 1304 (1994), requires that imports into the United States be conspicuously marked with the name of their "country of origin." Where, as here, an article is not completely manufactured in one country, "[f]urther work or material added to an article in [the other country] must effect a substantial transformation in order to render such other country the 'country of origin'" within the

meaning of 19 U.S.C. § 1304. 19 C.F.R. § 134.1(b)(1995). In *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (1940), the predecessor to the Court of Appeals for the Federal Circuit held that a product undergoes a "substantial transformation" if, as a result of further manufacturing or processing, the product loses its identity and is transformed into a new product having "a new name, character[,] and use." 27 C.C.P.A. at 273 (the substantial transformation test or *Gibson-Thomsen* test).

In Count III of its complaint, Plaintiff alleged, "Having undergone a substantial transformation in Mexico, the crankshafts are products of Mexico for purposes of the assessment of duty and within the meaning of 19 U.S.C. § 1304." Pl.'s Second Am. Compl. ¶ 36. Thus, despite the requirement of a tariff shift under General Note 12(b)(ii), HTSUS, Plaintiff argues that the substantial transformation test requires a finding that Mexico is the country of origin of the subject crankshafts for purposes of marking, thereby affording them NAFTA duty preference. *See id.* ¶ 37.

Moving for summary judgment, Defendant contends that the issue of whether the imported crankshafts were substantially transformed in Mexico is irrelevant as a matter of law. *See* Mem. in Supp. of Def.'s Mot. for SJ at 28. Moreover, Defendant argues that the Court lacks subject matter jurisdiction to hear the marking issue: "It is black letter law that in the absence of an assessment of marking duties, or the exclusion or demand for redelivery of goods due to improper marking, none of which occurred here, the question of how imported goods should be marked is not a protestable issue under 19 U.S.C. § 1514." Def.'s Reply at 28. The Court, however, does not need to address the jurisdictional question because it is clear that, regardless, the substantial transformation test is irrelevant to whether Mexico is the country of origin of the imported crankshafts as a matter of law.

First, the Court notes that the country of origin determination for marking purposes under 19 U.S.C. § 1304 is distinct from the determination of whether a good is a NAFTA originating good under General Note 12(b)(ii), HTSUS. *See Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 901–02 (1999)(holding that the substantial transformation test was not relevant as to whether a good originated in Canada for the purposes of the United States-Canada Free Trade Agreement under General Note 3(c)(vii)(B)(2), HTSUS (1993)); *see also* General Note 12(b)(ii), HTSUS (1995).

Second, for the purpose of determining whether a good should be marked with a NAFTA territory as the country of origin, the NAFTA Marking Rules have displaced the substantial transformation test. The regulations at 19 C.F.R. § 134.1(b) provide that, "for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin." "The 'NAFTA Marking Rules' are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country." 19 C.F.R. § 134.1(j). The Secretary of the Treasury promulgated the NAF-

TA Marking Rules to be applied in the United States at 19 C.F.R. Part 102. Section 102.11 states that, where a good is not wholly produced in one country, "[t]he country of origin of [the] good is the country in which * * * [e]ach foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20[.]" 19 C.F.R. § 102.11(a)(3)(1995). The NAFTA Marking Rules do not mention the substantial transformation test in instructing how to determine the country of origin.

The statute expressly directs that the NAFTA Marking Rules be employed in determining whether to accord goods NAFTA preferential duty treatment. *See* General Note 12(a)(ii), HTSUS ("Goods that originate in the territory of a NAFTA party * * * *and* that qualify to be marked as goods of Mexico *under the terms of the marking rules as set forth in regulations issued by the Secretary of the Treasury* * * * are eligible for [NAFTA] duty rate[.]"). Therefore, the statute authorizes the use of the tariff shift test, instead of the substantial transformation test, for goods not wholly produced in one country. Moreover, Plaintiff has failed to distinguish this case from the circumstances underlying the Federal Circuit's holding in *Bestfoods v. United States*, 165 F.3d 1371, 1375–76 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 42 (1999)(holding that it was valid for the Secretary of the Treasury "to adopt a construction of the federal marking statute, for NAFTA goods, that was based on the tariff-shift approach instead of the *Gibson-Thomsen* approach[]"). Therefore, because the substantial transformation test is irrelevant to the determination of whether Mexico is the country of origin of the crankshafts as a matter of law, the Court grants Defendant's motion for summary judgment on this issue.

Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is granted.

(Slip Op. 99-139)

RUSSELL STADELMAN & CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96-08-01911

[Plaintiff's Motion for Summary Judgment is denied; Defendant's Cross-Motion for Summary Judgment is granted.]

(Decided December 21, 1999)

Sandler, Travis & Rosenberg, P.A., (Edward M. Joffe and *Beth C. Ring)* for Plaintiff.

David W. Ogden, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, *Mikki Graves Walser*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *George Brieger*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel, for Defendant.

OPINION

POGUE, *Judge:* Plaintiff, Russell Stadelman & Co., challenges a decision of the United States Customs Service ("Customs") denying Plaintiff's protests filed in accordance with section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (1994). At issue is the proper tariff classification under 19 U.S.C. § 1202 (1994), Harmonized Tariff Schedule of the United States ("HTSUS"), of Plaintiff's imports of sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and mangue (*T. rhoisoia*) plywood from Brazil.[1]

Plaintiff claims that the subject merchandise is classifiable under subheading 4412.11.20, HTSUS (1992–1995),[2] which covers "[p]lywood consisting solely of sheets of wood, each ply not exceeding 6 mm in thickness * * * [w]ith at least one outer ply of the following tropical woods: * * * Baboen[.]" Plywood imported from Brazil and classifiable under subheading 4412.11.20, HTSUS, is eligible for duty-free treatment under the Generalized System of Preferences ("GSP"). Customs classified the merchandise under a residual provision, subheading 4412.12.20, HTSUS (1992–1995), which covers "[p]lywood consisting solely of sheets of wood, each ply not exceeding 6 mm in thickness[,]" and not requiring an outer ply of one of the tropical woods enumerated in subheading 4412.11, HTSUS. Brazilian imports classifiable under subheading 4412.12.20, HTSUS, are not eligible for GSP treatment; therefore, Customs assessed the subject merchandise at the provided 8% duty rate.

Jurisdiction is predicated on 28 U.S.C. § 1581(a)(1994); therefore, Customs' classification is subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994). This action is before the Court on the cross-mo-

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[1] The italicized names in parentheses refer to each plywood's corresponding scientific name. The scientific names are based on taxonomy, the hierarchy of biological classification comprised of kingdom, phylum, class, order, family, genus, and species. *See McGraw-Hill Concise Encyclopedia of Science and Technology* 1847–48 (2d ed. 1989). The first name in parentheses is the genus, the second is the species. "Spp." stands for *species plurales*, indicating that all species of the given genus are referred to.

The "*T.*" in "*T. rhoisoia*" is apparently the genus abbreviated. The record, however, fails to indicate which genus the "*T.*" refers to.

[2] Plaintiff imported from Brazil the plywood at issue during the period October 1992 through February 1995. Throughout these years, the language of the relevant HTSUS provisions remained the same.

tions for summary judgment made by Plaintiff and Defendant, the United States, pursuant to USCIT Rule 56.[3]

STANDARD OF REVIEW

Under USCIT Rule 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT Rule 56(d); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The Court analyzes a Customs classification issue in two steps: "first, [it] construe[s] the relevant classification headings; and second, [it] determine[s] under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998)(citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)). Whether the subject merchandise is properly classified is ultimately a question of law. *See id.* Summary judgment of a classification issue is therefore appropriate "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is."[4] *Id.*

Here, the parties agree what the merchandise is. The parties agree that the subject merchandise "consists of sheets of plywood, with no single ply exceeding 6 mm. [sic] in thickness, and [that are] not surface covered." Pl.'s Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried ("Pl.'s Statement") ¶ 1; Def.'s Resp. to Pl.'s Statement ¶ 1. Moreover, the parties agree that the merchandise at issue consists of sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and mangue (*T. rhoisoia*) plywood.[5] *See* Def.'s Additional Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried ("Def.'s Additional Statement") ¶ 1; Pl.'s Resp. To Def.'s Additional Statement ¶ 1. Thus, Plaintiff and Defendant do not disagree as to what the merchandise is; they simply disagree as to how it should be

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[3] Defendant moved this Court for an order granting oral argument on the parties' cross-motions for summary judgment. Because the issues presented are thoroughly addressed in the parties' briefs, however, Defendant's motion is denied.

[4] Following the Federal Circuit's holding in *The Mead Corp. v. United States*, 185 F.3d 1304, 1307 (1999), the Court does not afford the deference articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–45 (1984), to Customs' standard classification rulings. Moreover, although there is a statutory presumption of correctness, *see* 28 U.S.C. § 2639(a)(1), that attaches to Customs' classification decisions, that presumption does not apply where the Court is presented with a question of law in a proper motion for summary judgment, *see Universal Electronics*, 112 F.3d at 492.

[5] Originally in its complaint, Plaintiff stated that the subject imports were invoiced as "virola, white virola, sumauma, faviera [sic], mangue, amesclao, breu, muiratinga, guatambu[,] and/or with terms of similar import and description." Pl.'s Compl. ¶ 18. According to Defendant, however, the subject imports were invoiced as edai virola (baboen) plywood and red virola (baboen) plywood, which Customs classified under subheading A4412.11.20, HTSUS, free of duty; sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and Mangue (*T. rhoisoia*) plywood, which Customs classified under subheading 4412.12.20, HTSUS, 8% *ad valorem*; pinus plywood, which Customs classified under subheading 4412.19.40, HTSUS, 20% *ad valorem*; and veneers of amesclao, light breu, and copaiba, which Customs classified under subheading 4408.90.00, HTSUS, free of duty. *See* Def.'s Resp. to Pl.'s Statement ¶ 3; Def.'s Mem. in Opp'n to Pl.'s Mot. for SJ at 1–2.

Therefore, according to Defendant, the only imports at issue are sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and mangue (*T. rhoisoia*) plywood. *See* Def.'s Mem. in Opp'n to Pl.'s Mot. for SJ at 2. Plaintiff now agrees that the only imports at issue are sumauma, faveira, and mangue plywood. *See* Pl.'s Resp. To Def.'s Additional Statement ¶ 1.

classified. Summary judgment of the classification issue is therefore appropriate.

DISCUSSION

The HTSUS consists of (A) the General Notes; (B) the General Rules of Interpretation; (C) the Additional U.S. Rules of Interpretation; (D) sections I to XXII, inclusive (encompassing chapters 1 to 99, and including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto); and (E) the Chemical Appendix.

The proper classification of merchandise is governed by the General Rules of Interpretation ("GRI") to the HTSUS. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). GRI 1 for the HTSUS provides that, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." GRI 1, HTSUS; *see also Orlando Food Corp.*, 140 F.3d at 1440; Harmonized Commodity Description and Coding System, Explanatory Notes (1st ed. 1986)("Explanatory Notes")[6] at 1 ("[T]he terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification[.]"). Here, the parties agree that the subject imports should be classified under heading 4412, HTSUS, but dispute the correct subheading. Therefore, the Court reviews the parties' proffered classifications pursuant to GRI 6. *See* GRI 6, HTSUS ("For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the [preceding GRIs], on the understanding that only subheadings at the same level are comparable.").

The merchandise at issue literally falls within the scope of Customs' classification under subheading 4412.12.20, HTSUS, a residual provision covering plywood without an outer ply of one of the tropical woods enumerated in subheading 4412.11, HTSUS. Plaintiff argues, however, that the subject merchandise is more specifically classifiable under subheading 4412.11.20, HTSUS, as plywood with at least one outer ply of the tropical wood "baboen." Classification of imported merchandise in a residual, or "basket," provision is only appropriate when there is no tariff category that covers the merchandise more specifically. *See EM Indus., Inc. v. United States*, 22 CIT ___, ___, 999 F. Supp. 1473, 1480 (1998)("'Basket' or residual provisions of HTSUS Headings * * * are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading."); *E.M. Chemicals v. United States*, 20 CIT ___, ___, 923 F. Supp. 202, 206 (1996); *see also* GRI 3(a), HTSUS. Therefore, before the Court may conclude that Customs correctly classified the subject goods under subheading 4412.12.20, HTSUS, we must first address whether they are

[6] The Explanatory Notes "provide a commentary on the scope of each heading of the Harmonized [Tariff] System and are thus useful in ascertaining the classification of merchandise under the system." H.R. Conf. Rep. No. 576, 100th Cong., 2nd Sess. 549 (1988). It has long been settled that, "[w]hile the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS[US] subheadings." *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

more specifically classifiable under subheading 4412.11.20, HTSUS. The precise issue before the Court, then, is whether Plaintiff's imports of sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and mangue (*T. rhoisoia*) plywood qualify as "baboen."

Neither the HTSUS nor its legislative history defines "baboen." "When a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is its common meaning." *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)(citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992)). To determine the common meaning of a tariff term, "[a] court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities[.]" *Id.* (citing *Brookside Veneers, Ltd. v. United States*, 6 Fed. Cir. (T) 121, 125, 847 F.2d 786, 789 (1988)). "Additionally, a court may refer to the Explanatory Notes of a tariff subheading, which do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings." *Id.* (citing *Lynteq*, 976 F.2d at 699).

Thus, the Court turns to various dictionaries and scientific authorities to construe the tariff term "baboen." Although most of the dictionaries the Court consulted did not define the term, the ones that did defined "baboen" as a "tropical American timber tree (*Myristica surinamensis*) with reddish wood." *Webster's New International Dictionary* 197 (1955); *Webster's Third New International Dictionary* 156 (1993). *Myristica* is a botanical genus within the family *Myristicaceae*. *See The Concise Oxford Dictionary of Botany*, 268 (Michael Allaby ed., 1992).

Meanwhile, a more technical dictionary defines "baboen" as "*Virola surinamensis*[.]" D.J. Mabberley, *The Plant Book: A Portable Dictionary of the Vascular Plants* 71 (1997). *Virola surinamensis*, in turn, is the scientific name for a tropical American timber within the botanical genus *Virola*, which also falls under the botanical family *Myristicaceae*. *See id.* 747–48. Plaintiff's Exhibit 1 to its motion for summary judgment, another technical source, also defines "baboen" as *Virola surinamensis*, citing as related species *Virola sebifera* and *Virola melinonii*. *See* Surinam Forest Service, *Surinam Timber: A Summary with Brief Descriptions of the Main Timber Species of Surinam* 7–8 (2d ed. 1955).

The Court cannot locate a technical dictionary recognizing *Myristica surinamensis* as an actual tree. Thus, the standard and technical dictionaries do not appear to define "baboen" consistently. For the following reasons, however, the Court concludes that in this case it is more accurate to rely on the scientific authorities for the common meaning of the term. First, as noted above, most standard dictionaries do not even define the term, and the ones that did defined the term scientifically. In addition, it is undisputed that the term "baboen" is not used commercially in the United States. *See* Def.'s Additional Statement ¶ 3; Pl.'s Resp. to Def.'s Additional Statement ¶ 3. In such situations where a tariff term is not generally or commercially used, it is particularly appropri-

ate to consult more technical authorities for the term's intended meaning. *See C.J. Tower & Sons of Buffalo, Inc. v. United States*, 69 Cust. Ct. 105, 111 (1972)(recognizing that the court may consult technical sources in construing tariff terms where the definitions of articles of a technical nature are not reflected in dictionaries prepared for general use), *aff'd*, 61 C.C.P.A. 74, 496 F.2d 1219 (1974).

Second, authoritative sources indicate that the standard and technical definitions of "baboen" are actually consistent. At the end of the 1800s, *Myristica* was the only recognized genus of the family *Myristicaceae*. *See* Dr. E. Warming, *A Handbook of Systematic Botany* 393 (1895). Since then, the scope of *Myristicacea* has broadened to include up to nineteen genera, *Virola* among them. *See* Roger Hyam and Richard Pankhurst, *Plants and Their Names: A Concise Dictionary* 332 (1995); *The Concise Oxford Dictionary of Botany* 268 (Michael Allaby ed., 1992). At one point during the evolution of the term, it appears that *Myristica* and *Virola* were synonymous. *See Paxton's Botanical Dictionary* 384, 585 (Samuel Hereman ed., 1868). Thus, it appears likely that the standard dictionary definition of "baboen" as *Myristica surinamensis* is based on an outdated scientific definition of the term, which was replaced by *Virola surinamensis* when *Virola* became an additionally recognized genus of the family *Myristicaceae*. Under this theory, then, the standard lexicographic and scientific definitions for "baboen" are consistent.[7]

In addition, the Explanatory Notes help to define Congress' intended meaning of "baboen." The subheading Explanatory Note to Chapter 44 explains that,

> For the purposes of classification in subheadings 44.03, 44.07, 44.08 and 44.12, certain tropical woods are designated according to the pilot-name recommended by the International Technical Association for Tropical Timber (l'Association Technique Internationale des Bois Tropicaux)(ATIBT). The pilot-name is based on the popular name employed in the principal country of production or of consumption.
>
> The relevant pilot-names, together with corresponding scientific names and local names, are listed in the Annex to the Explanatory Notes to this Chapter.

Explanatory Notes at 623.

During the drafting of Chapter 44 to the Harmonized Tariff System, the United Nations Conference on Trade and Development ("UNCTAD") recommended that the Harmonized System Committee of the Customs Cooperation Council adopt the ATIBT pilot-names for certain tropical woods. *See Harmonized Commodity Description and Coding System, Chapter 44: Wood and Articles of Wood, Proposals Submitted by UNCTAD*, Doc. 23.769 E at 3 (Dec. 20, 1977). Many of the tropical wood species had different names in commerce according to local dialect. *See*

[7] The Court's finding is buttressed by the fact that Plaintiff did not argue that there is any inconsistency between the standard and technical dictionaries' respective definitions of "baboen."

id. Thus, the Harmonized System Committee adopted the ATIBT pilot-names for use in the Harmonized Tariff Schedule, as the pilot-names represented "the only existing international [n]omenclature, established by agreement between producers of or traders in tropical timber and scientific bodies." *Harmonized Commodity Description and Coding System, Chapter 44: Wood and Articles of Wood, Additional Information and New Proposals Submitted by UNCTAD*, Doc. 24.153 E at 5 (Apr. 12, 1978).

As with each pilot-name, the Explanatory Notes Annex to Chapter 44 lists "baboen" with its corresponding scientific and local names. *See* Explanatory Notes at 643. No local name for "baboen" in the United States is listed. *See id.* The scientific names listed as equivalent to "baboen" are *Virola venezuelensis*, *Virola bicuhyba*, *Virola melinonii*, *Virola surinamensis*, *Virola mycetis*, and *Virola koschnyi*. *See id.*[8]

The ultimate question for this Court to answer is whether the subject merchandise was properly classified. *See Bausch & Lomb*, 148 F.3d at 1365. Although the lexicographic and Explanatory Note definitions of "baboen" differ slightly, both appear to limit the scope of the term to species of the genus *Virola*. Plaintiff's imports of sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and mangue (*T. rhoisoia*) plywood are not of the genus *Virola*. Therefore, Plaintiff's imports are not classifiable as plywood with "at least one outer ply of * * * Baboen" under subheading 4412.11.20, HTSUS. Accordingly, Customs correctly classified the subject imports under subheading 4412.12.20, HTSUS, the residual provision for "[p]lywood consisting solely of sheets of wood, each ply not exceeding 6 mm in thickness[,]" and not requiring an outer ply of one of the tropical woods enumerated in subheading 4412.11, HTSUS.

Plaintiff advances three main arguments challenging Customs' refusal to classify the subject imports as containing an outer ply of "baboen" within the meaning of subheading 4412.11.20, HTSUS: (1) the tariff term "baboen" should be interpreted according to its common and commercial meaning, which is broader than its scientific meaning, *see* Mem. in Supp. of Pl.'s Mot. for SJ at 14; (2) even if the Court were to find that the common and commercial meanings of "baboen" differ, Plaintiff's imports are within the commercial meaning of the term, *see id.* at 26–28; *see also* Pl.'s Reply to Def.'s Mem. in Opp'n to Pl.'s Mot. for SJ ("Pl.'s Reply") at 20–21; and (3) classification according to scientific names is commercially impracticable to administer because many tropical plywoods are manufactured from mixed species yet marketed under a single commercial name, *see* Mem. in Supp. of Pl.'s Mot. for SJ at 24–25.

(A) Common and commercial meaning versus scientific meaning

Plaintiff argues that "tariff terms are to be interpreted according to a common and commercial meaning broader in scope than narrow scien-

[8] The Annex lists "Ucuhuba" as the local name for "baboen" in Brazil, the exporting country. *See* Explanatory Notes at 643. "Ucuhuba" is defined as *Virola surinamensis*. *See* D.J. Mabberley, *The Plant Book: A Portable Dictionary of the Vascular Plants* 734 (1997).

tific definition—unless there is a clear expression of Congressional intent to use that narrower scientific definition." Mem. in Supp. of Pl.'s Mot. for SJ at 14, 15 (citing *Two Hundred Chests of Tea*, 22 U.S. 430 (1824); *Alexandria Int'l, Inc. v. United States*, 13 CIT 689 (1989)).

According to Plaintiff, the common and commercial meaning of "baboen" is virola, and "virola"[9] covers not only the species of the botanical genus *Virola*, but the thirty-five near species, including Plaintiff's imports of sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and mangue (*T. rhoisoia*) plywood. *See* Mem. in Supp. of Pl.'s Mot. for SJ at 6. Customs therefore erred, Plaintiff argues, in limiting "baboen" to its scientific definition, which only covers species of the botanical genus *Virola*. *See id.* at 17.

In construing the meaning of a tariff term, the Supreme Court in *Two Hundred Chests of Tea* pronounced, "[The legislature] did not suppose our merchants to be naturalists, or geologists or botanists. It applied its attention to the description of articles, as they derived their appellations in our own markets[.]" 22 U.S. at 438. Similarly, in *Alexandria Int'l*, this court recognized, "It is well established that where the scientific meaning of a tariff term differs from the term's common or commercial meaning, the term is not to be construed according to the scientific meaning, absent a contrary intent by Congress in using the term." 13 CIT at 692 (citing *Two Hundred Chests of Tea*, 22 U.S. at 438).

Plaintiff's reliance on these two cases in this instance, however, is misplaced. In *Two Hundred Chests of Tea*, the Supreme Court reviewed whether certain imported teas fell within the common and commercial meaning of "bohea tea." *See* 22 U.S. at 439. In doing so, the Court defined the scope of actual terms of the statute, "bohea tea." *See id.* ("The true inquiry, therefore, is, whether, in a commercial sense, the tea in question is known, and bought and sold, and used, under the denomination of bohea tea."). Similarly, in *Alexandria Int'l*, this court sought to determine the common and commercial meaning of the tariff term "sardine" in reviewing whether imports of a particular type of anchovy fell within that meaning. *See* 13 CIT at 696–97. Thus, *Two Hundred Chests of Tea* and *Alexandria Int'l* indicate that, in applying a tariff term's common and commercial meaning over its scientific meaning, a court must construe the actual terms of the statute. *See* 22 U.S. at 438–39; 13 CIT at 696–97.

Here, however, Plaintiff does not argue that its imports of plywood are commonly and commercially known in the United States as the tariff term "baboen." On the contrary, it is undisputed that the term "baboen" is not commercially used in the Untied States. *See* Def.'s Additional Statement ¶ 3; Pl.'s Response to Def.'s Additional Statement ¶ 3. Instead, Plaintiff argues that the common and commercial meaning of "baboen" in the United States is virola and that its imports are commonly and commercially known in the United States as "virola." Thus,

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[9] Henceforth, "virola" in normal script refers to the common designation of the term; "*Virola*" italicized and capitalized refers to the term's scientific meaning as a botanical genus.

Plaintiff defines "virola" in the attempt to persuade this Court that its imports of plywood are within the common and commercial meaning of "baboen." Plaintiff's conclusion does not logically follow from its premise.

Again, in the absence of a contrary legislative intent, tariff terms are not to be construed according to their scientific meaning, where that meaning differs from the common or commercial meaning. *See, e.g., United States v. Sandoz Chemical Works, Inc.*, 46 C.C.P.A. 115, 118 (1959); *Alexandria Int'l*, 13 CIT at 692. Here, as discussed above, *see supra* pp. 11–12, the standard dictionary definition of "baboen" is consistent with the scientific definition. Thus, because the scientific definition does not conflict with the common definition, there is no reason not to construe "baboen" according to its technical definition, especially here where the few standard dictionaries that actually define "baboen" also define the term scientifically, and the term is not generally used. *Cf. C.J. Tower & Sons*, 69 Cust. Ct. at 111.

Moreover, even if it could be argued that the common meaning of "baboen" is not equivalent to its scientific meaning, there is ample indication that Congress intended to define the term with precision. In prescribing subheading 4412.11, HTSUS, Congress chose to designate certain tropical woods by the pilot-names recommended by the ATIBT. Each pilot-name, in turn, is listed in the Explanatory Notes Annex to Chapter 44 with its corresponding scientific and local names. No local name in the United States is listed for "baboen." *See* Explanatory Notes at 643. That "baboen" is thus defined by the scientific names enumerated in the Explanatory Notes Annex as corresponding with the term, *see id.*, indicates that Congress intended to define the term scientifically.[10]

(B) Commercial meaning

In the alternative, Plaintiff argues that "baboen" should be interpreted according to a commercial designation. Again according to Plaintiff, "the term 'Baboen' is known as 'Virola' in the United States, and that commercial designation of 'Virola' plywood in the United States at the time of enactment of the HTSUS in 1989 or at the time of the subject entries included the plywood with outer plies of the 'near species' including Sumuama, Faveira[,] and Mangue in this case." Pl.'s Reply at 20.

"One who argues that a term in the tariff laws should not be given its common or dictionary meaning must prove that 'there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade.'" *Rohm & Haas Co. v. United States*, 2 Fed. Cir. (T) 28, 29, 727 F.2d 1095, 1097 (1984)(quoting *Moscahlades Bros. v. United States*, 42 C.C.P.A. 78, 82 (1954)). "'Proof of commercial designation is a question of fact to be established in each case.'" *Id.* (quoting

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[10] In addition, the available definitions of the local names listed in the Annex for "baboen" are *Virola surinamensis* and/or *Virola koschnyi*. *See* D.J. Mabberley, *The Plant Book: A Portable Dictionary of the Vascular Plants* 75, 212, 734, 747–48 (1997).

S.G.B. Steel Scaffolding & Shoring Co. v. United States, 82 Cust. Ct. 197, 206 (1979)).

Here, Plaintiff has offered the affidavit and deposition testimony of numerous domestic industry witnesses. *See* Mem. in Supp. of Pl.'s Mot. for SJ at 27–28 (citations omitted). In attempting to prove a commercial meaning for "baboen," however, Plaintiff once again does not define "baboen." Instead, Plaintiff argues that the commercial designation of "baboen" in the United States is "virola," and that the common meaning of "virola" includes both the species of the botanical genus *Virola* and the thirty-five near-species, which include the subject merchandise. *See id.* at 6, 9–10, 27–28; Pl.'s Reply at 20–21. It is undisputed, and Plaintiff concedes, however, that "baboen" is not a term used commercially in the United States. *See* Def.'s Additional Statement ¶ 3; Pl.'s Response to Def.'s Additional Statement ¶ 3. Thus, the term itself does not have a commercial meaning.

In proving commercial designation of a tariff term, one must define the precise terms used in the statute. *See Neuman & Schwiers Co., Inc. v. United States*, 24 C.C.P.A. 127, 132 (1936)("The rule is * * * that he who relies upon proving commercial designation to bring a certain product within a statutory term, must take the term as it appears in the statute."); *Borneo Sumatra Trading Co., Inc. v. United States*, 56 Cust. Ct. 166, 178 (1966)("If an article is not within the common meaning of a tariff term, in order to bring it within that term by proof of commercial designation, it must be shown that it was bought and sold or known in the trade by the term contained in the statute.").

In *Neuman & Schwiers*, the predecessor to the Federal Circuit held that the importer did not prove that its imports were within the commercial meaning of the tariff term "sauces," where its imports were bought and sold as "wine sauces," "Sauce Bercy," and "Sauce Bordelais." *See* 24 C.C.P.A. at 132. Similarly, here, Plaintiff has not shown that its imports of sumauma, faveira, and mangue plywood were commercially known as "baboen." Therefore, Plaintiff has not proven that its imports fall within a commercial meaning of "baboen." Proof of commercial designation requires use of the precise tariff terms at issue.

Plaintiff argues that the holding of "*Neuman & Schwiers* is inapplicable to this case where the [Explanatory Note Annex to Chapter 44] * * * clearly provides for local names different from the pilot-name, the name appearing in the tariff." Pl.'s Reply at 18. The Court disagrees. Again, in prescribing heading 4412, HTSUS, Congress chose to designate certain tropical woods by the pilot-names recommended by the ATIBT. Each pilot-name, in turn, is listed in the Explanatory Notes Annex to Chapter 44 with its corresponding scientific and local names, yet no U.S. local name is listed for "baboen." *See* Explanatory Notes at 643. Therefore, it cannot be presumed that Congress was aware of a United States local name distinct from "baboen."

Thus, the Court's only recourse is to construe the common meaning of the tariff term "baboen" employing lexicographic aids and the applica-

ble Explanatory Notes. *See Mita Copystar*, 21 F.3d at 1082. As demonstrated above, the lexicographic sources and the Explanatory Notes alike indicate the intent to limit the definition of "baboen" to species of the botanical genus *Virola*. *See supra* pp. 9–14. Plaintiff's imports of sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and mangue (*T. rhoisoia*) plywood are not woods of the genus *Virola*. Therefore, Plaintiff's imports are not "baboen" within the meaning of subheading 4412.11.20, HTSUS.[11]

(C) Commercial Practicability

Plywood "consist[s] of three or more sheets of wood glued and pressed one on the other[.]" *See* Explanatory Notes at 632. "Each component sheet is known as a 'ply[.]'" *Id.* Subheading 4412.11.20, HTSUS, requires that the plywood consist of at least one outer ply of the enumerated tropical woods, including baboen. Plaintiff argues that "a requirement that[,] in order to be classified as Baboen, at least one outer surface must be of the botanical genus Virola spp." would "not only [be] commercially unfeasible [sic], but virtually impossible to administer." Mem. in Supp. of Pl.'s Mot. for SJ at 25.

Plaintiff explains that, in making the subject plywood, the Brazilian mills compress wood sheets according to similar color, not according to species. *See id.* at 7 (citing Aff. of John Rego ¶ 9, Pl.'s Ex. 9). Therefore, it is "common to have one species on the face, a different species on the back, and several other species constituting the core" of a given sheet of plywood. *Id.* Moreover, the Brazilian industry "invoice[s] based on the species on the face ply of the plywood[,]" and a "mill will identify one species for the entire shipment on the invoice, even though there may be many different species on the faces of the individual plywood panels contained in the entire shipment." *Id.* at 8 (citing Aff. of John Rego ¶ 10, Pl.'s Ex. 9).

According to Plaintiff, Customs' interpretation of subheading 4412.11.20, HTSUS, would be commercially infeasible because it would require the "plywood mills [to] actually identify the botanical species of *each* surface of *each* piece of plywood in a shipment containing many crates of plywood in order to know how to classify it." *Id.* at 25. Subheading 4412.11.20, HTSUS, however, clearly states that plywood must contain "at least one outer ply of * * * Baboen" in order to be classified as

[11] Plaintiff notes that the 1996 version of heading 4412, HTSUS, replaced "baboen" with "virola." *See* Mem. in Supp. of Pl.'s Mot. for SJ at 4, 22 n. 11. In arguing for a commercial designation, Plaintiff contends that the change in terms indicates a recognition by Congress that "baboen" and "virola" were synonymous. *See id.* at 4; Pl.'s Reply at 20.

Reference to the 1996 HTSUS, however, does not support Plaintiff's case. As with the earlier HTSUS provisions, Congress based the names of the tropical woods of heading 4412, HTSUS (1996), on the pilot-names recommended by the ATIBT. *See* Explanatory Notes (1996) at 671 ("For the purposes of * * * the relevant subheadings of headings 44.03, 44.07, 44.08 and 44.12, the names of the tropical woods are designated according to the pilot-names recommended by the [ATIBT]."). Thus, the change in language resulted from the ATIBT's recommendation to change the pilot-name designation.

"'A change in the language of a statute is generally construed to import a change in meaning * * *.'" *Bausch & Lomb*, 148 F.3d at 1367 (quoting Ruth F. Sturm, *Customs Laws and Administration* § 51.7 at 57 (1995)). The previous version of the Explanatory Notes Annex to Chapter 44, HTSUS, defines "baboen" scientifically as six species of the genus *Virola*. *See* Explanatory Notes at 643 (1994). The 1996 version of the Explanatory Notes Annex, meanwhile, defines "virola" as including *all* species of the genus *Virola*, indicating that "virola" is a broader term than "baboen." Thus, if anything, the replacement of "virola" for the narrower term "baboen" in the 1996 version of heading 4412, HTSUS, supports the conclusion that Customs correctly refused to classify Plaintiff's imports as containing an outer ply of "baboen"; the change is only necessary because the original term did not include the entire genus.

such, and the Court cannot locate any authority for the theory that the plain language of the tariff schedule will not be given effect where it would burden or inconvenience the producer. In any event, compliance with the tariff provision does not appear commercially infeasible in this case because the Brazilian mills keep an inventory of which timber species they purchase. *See* Aff. of John Rego ¶ 8, Pl.'s Ex. 9. Under the circumstances of this case, Plaintiff's commercial impracticability argument fails to persuade the Court that Customs incorrectly classified the subject merchandise.

CONCLUSION

For the foregoing reasons, the Court holds that Customs correctly classified Plaintiff's imports of sumauma (*Ceiba pentandra*) plywood, faveira (*Parkia spp.*) plywood, and mangue (*T. rhoisoia*) plywood under subheading 4412.12.20, HTSUS, as a matter of law. Accordingly, Plaintiff's motion for summary judgment is denied. In turn, Defendant's cross-motion for summary judgment is granted, and judgment is entered for Defendant.

(Slip Op. 99–140)

3V, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–05–00718

[Defendant's Motion To Dismiss for failure to state a claim upon which relief may be granted, is granted.]

(Decided December 21, 1999)

Reed Smith Shaw & McClay (James K. Kearney), Washington, D.C., for Plaintiff.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Saul Davis*, Senior Trial Counsel), for Defendant.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* This matter is before the Court on the Defendant's Motion To Dismiss For Lack Of A Justiciable Controversy ("Motion To Dismiss") pursuant to USCIT R. 12(b)(5)[1]. This Court grants Defendant's Motion.

[1] The Government actually mistakenly filed its Motion pursuant to USCIT R. 12(b)(6); however, there is no USCIT R. 12(b)(6). Though styled under USCIT R. 12(b)(6), this Court will treat the Government's Motion as filed pursuant to the proper provision, USCIT R. 12(b)(5).

II

Background

Plaintiff, 3V, Inc. ("3V"), challenges the Government's classification of 3CC/M,[2] trichlorocarbanilide marketed by 3V under that trade name. Plaintiff's Complaint was filed in October 1998, to contest Customs' October 1996 denial of 3V's administrative protest regarding two entries of 3CC/M.

Plaintiff alleges that Customs improperly classified its importations of 3CC/M as cyclic amides, HTSUS tariff item 2924.21.16.00.[3] Entries under that heading enter duty free under the Agreement on Trade in Pharmaceutical Products. 3V argues the 3CC/M is "more specifically provided for" under the heading for acyclic amides, HTSUS 2924.10.10.50.[4] Compl. at ¶ 9. Entries under that heading also enter duty free under the Agreement on Trade in Pharmaceutical Products.

On February 16, 1999, the Government filed Defendant's Motion to Dismiss For Lack of a Justiciable Controversy. Defendant argues that the Court can order no relief because both the assessed and claimed provisions are duty-free. Therefore, it says, the Complaint does not meet the "case and controversy" requirements of Article III of the U.S. Constitution.

The central issue in this case is whether the Court may decide a claim brought pursuant to 28 U.S.C. § 1581(a) in which the rates of duty under both the claimed and assessed provisions are the same (duty-free).

For the reasons set forth below, the Court finds that it cannot decide such a claim, and grants Defendant's Motion To Dismiss.

III

Discussion

A

Article III Grants Federal Courts Jurisdiction Only Over Live Cases and Controversies for Which Effective Relief May Be Granted to an Aggrieved Party

Plaintiff filed this claim pursuant to 28 U.S.C. § 1581(a) for denial of a protest regarding Customs' classification of its product, 3CC/M. Pur-

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[2] The product 3CC/M is a bactericide used in deodorant soap and stick products.

[3] HTSUS Subheading 2924.21.16.00 reads:

2924	Carboxyamide-function compounds; amide-function compounds of carbonic acid:
	Cyclic amides (including cyclic carbamates) and their derivatives; salts thereof:
2924.21	Ureines and their derivatives; salts thereof:
	Aromatic:
	Pesticides:
* * *	* * * * *
2924.21.16.00	Other.

[4] HTSUS Subheading 2924.10.10.50 reads:

2924	Carboxyamide-function compounds; amide-function compounds of carbonic acid:
2924.10	Acyclic amides (including acyclic carbamates) and their derivatives; salts thereof:
2924.10.10	Amides
* * *	* * * * *
2924.10.10.50	Other.

suant to § 1581(a), "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (1994). Plaintiff argues that the Court's analysis should end here, and it should hold that since it has a specific grant of jurisdiction, it will entertain Plaintiff's claim.

However, despite a statutory grant of jurisdiction, a court's authority to entertain a claim hinges upon meeting the requirements of Article III of the U.S. Constitution. *See generally NSK Ltd. v. United States*, 17 CIT 488 (1993); *Alhambra Foundry v. United States*, 10 CIT 330, 635 F. Supp. 1475 (1986). Pursuant to Article III, federal courts are only empowered to decide those claims which present live cases or controversies. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974)); *Acrilicos v. Regan*, 9 CIT 442, 446, 617 F.Supp. 1082, 1085 (1985); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980). If a claim fails the Article III criteria, the Court must dismiss the claim as non-justiciable regardless of a statutory grant of jurisdiction. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969).

The Supreme Court has articulated the case and controversy principle more fully. In *California v. San Pablo & T.R. Co.*, it stated:

> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

149 U.S. 308, 314 (1893); *accord North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." (citing *Local No. 8–6, Oil Chemical and Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367 (1960))).

B

Because This Court Has Been Presented With A Moot Question, This Case Must Be Dismissed

Here there is no case or controversy. Both parties have neither an interest nor a stake in the outcome, and neither's rights are "actually controverted." No matter what the final ruling on the merits of this case, the Government collects and 3V pays nothing. That fact renders the classification decision a "moot question or an abstract proposition." The parties disagree as to the correct classification of the merchandise; not every disagreement is a federal case.

The only possible interest Plaintiff has is in the effect of a classification determination on future cases.[5] As *San Pablo* specifically states, federal courts are not empowered to declare rules of law to govern future cases. *California v. San Pablo*, 149 U.S. at 314. Further, this Court has already held that declaratory relief sought to affect the outcome of future entries is not available for § 1581(a) classification cases. *See Outlet Book Co., Inc. v. United States*, 14 CIT 458, 465, 743 F. Supp. 881, 888 (1990).

Even if this Court was authorized to issue a declaratory judgment as to classification, Plaintiff's wished for result, aid in the penalty case, would not necessarily be fulfilled. The Supreme Court has held that in customs classification cases a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise by the same parties. *See United States v. Stone & Downer Co.*, 274 U.S. 225, 233–237 (1927); *Outlet Book*, 14 CIT at 465, 743 F. Supp. at 888.

In the present case, Customs' classification of 3CC/M caused no injury to 3V. The classification applied, cyclic amides, is duty free. The classification 3V alleges should have been used, acyclic amides, is also duty free. There is no live case or controversy to adjudicate, as 3V did not suffer any harm or injury from the classification assessed by Customs.[6]

Plaintiff does not claim any injury or monetary harm whatsoever in its Complaint. It only challenges Customs' classification of its product. Nowhere in Plaintiff's brief does 3V discuss or affirmatively argue why this claim presents a case or controversy. 3V appears to disregard these essential constitutional requirements in their entirety, and ignore this fundamental jurisdictional threshold.

Moreover, 3V's Complaint does not comply with the constitutional requirements governing jurisdiction. The prayer for relief merely requests reclassification. "[A] litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow*, 464 U.S. at 70 (citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)).

No actual injury has been suffered by Plaintiff in this case. No order issued by this Court would change the situation of the parties. Even if 3V were to win on the merits, no relief could be granted because no injury

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[5] In the Government's brief, it "surmise[d]" that 3V brought this suit to litigate certain issues involved in an administrative penalty action against it. Motion to Dismiss at 1, n.*. Rather than explicitly admitting or denying the government's "surmise" in their response, Plaintiff states that it "may be motivated to address the classification issue" to aid in its penalty case. Plaintiff's Opposition to Defendant's Motion to Dismiss for Lack of a Justiciable Controversy ("Plaintiff's Response") at 11.

[6] *See e.g.*, *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396, 400 n.9 (2d Cir. 1977) (stating, albeit in dicta, that where "a reclassification would have no effect on either the rate or amount of duty payable, no opportunity for challenge exists[,]" and "[i]t follows that there is no access to the * * * Court."). Even though this decision was based upon the jurisdictional provisions of the Customs Court in 1977, the fact that the Court now possesses increased jurisdiction does not remove the need to determine the existence of an actual controversy in which specific relief could be provided. As the Government notes, "the implication of [the case] remains—there is no specific relief that can be granted where a reclassification would have no affect upon the rate and amount of duties chargeable." Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss for Lack of a Justiciable Controversy ("Defendant's Reply") at 8.

See also e.g., *Shell Oil Co. v. United States*, 54 Cust. Ct. 64 (1965); *Mexican Petroleum Corp. v. United States*, 54 Cust. Ct. 146 (1965); *American Bitumuls Co. v. United States*, 54 Cust. Ct. 149 (1965) (dismissing protests as moot, holding that premature liquidation of entries subject to a tariff quota, imposing exactly the same duty as would have been imposed if liquidation was timely, presents no justiciable controversy).

was suffered. This Court is not empowered to issue decisions affecting only future cases, and it has no other choice than to dismiss the action. *See Mills v. Green*, 159 U.S. 651, 653 (1895).[7]

Case law supports this conclusion.[8] This Court's predecessor, in *Simon & Co. v. United States*, 55 Cust. Ct. 103, 108 (1965), dismissed a complaint similar to the one at bar. In that case, the assessed rate and claimed rate were equal. The Court stated, "Inasmuch as the protest states that claims are made only if the rate is lower than that assessed and as the court could not grant any effectual relief under the claim as to those entries, the protest must be dismissed to that extent." *Id.* at 108.

Plaintiff would have this Court read only the first half of that sentence. Plaintiff claims that in *Simon*, the dismissal was necessitated solely by the statement in the protest that the classifications were challenged only to the extent they were higher than the claimed rates. Plaintiff's Response at 9. However, while the protest did state its challenge narrowly, the Court's statement that it dismissed the claims because it "could not grant any effectual relief" indicates that this fact, and not the narrow statement of the challenge, was the cause of the dismissal. Simon & Co., 55 Cust. Ct. at 108.

Similarly, the Customs Court ruled in *Peters v. United States*, 41 Cust. Ct. 195 (1958), that since the final determination on the merits was that the correctly claimed classification duty rate was the same as the erroneously applied duty rate, the complaint had to be dismissed because the Court could not fashion a remedy.[9] As the Court stated, "Plaintiff has a wrong, but has suffered from that wrong no injury which can be reached by our judgment." *Id.* at 200. Such is the case here for 3V. Whether the classification was correct or erroneous, Plaintiff has suffered no injury for which a remedy can be ordered.

Following the Constitutional jurisprudence and this case law specifically, the Court is unable to grant any relief or provide any redress for 3V's claim in the form of a favorable judicial decision. This inability re-

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[7] *Mills* states that, "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when * * * it [is] impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." 159 U.S. at 653.

[8] At oral argument, Plaintiff's counsel cited *American Hardboard Assn. v. United States*, 651 F.Supp. 1441 (1986), as standing for the proposition that misclassification was intrinsically harmful.

American Hardboard stressed the importance of correct classification in holding that the parties cannot limit the tariff sections considered by the Court in classifying merchandise. In that case the Government had originally classified the merchandise under one section, but then later agreed with the importer that the first classification was erroneous. The parties still disagreed as to the correct classification. Both parties moved to dismiss the claim as moot as to the first classification so that in determining the correct tariff provision, the Court could not consider that original classification section. *Id.* at 1441–1443. The Court held that the parties could not so limit the Court because correctly classifying merchandise requires the Court to consider all tariff provisions, and not only those put before it by the parties. *Id.* at 1445. The Court said that to allow the parties to put only certain alternatives before the Court would be to allow the parties to force the Court to choose between possibly erroneous classifications. *Id.* at 1445.

The importance of correct classification was emphasized by the Court not because misclassification is inherently harmful, but because the Court's role in correctly classifying merchandise must not be impeded by the parties' choices of tariff provisions.

[9] In *Peters*, the Court reached the merits of the case only because three alternative theories were presented by the Plaintiff, and under two of those, a remedy could be fashioned. The Court implied, though specifically declined to state, that had the Defendants moved to sever and dismiss the claim at the same duty rate, it would have so ordered for want of a claim upon which relief could be granted. 41 Cust.Ct. 195, 199 (1958).

quires the Court to dismiss on Constitutional grounds, in spite of the specific grant of jurisdiction under 28 U.S.C. 1581(a).

IV

CONCLUSION

For a court to exercise jurisdiction, it must satisfy the cases and controversies requirement of the Constitution. One part of that requirement is that the plaintiff has been harmed. 3V claims no harm. Another part of the requirement is that the court have the ability to order effective relief of the plaintiff's harm. Since 3V claims no harm, this Court can fashion no relief.

With no harm claimed, 3V's claim fails the Constitutional cases and controversies requirement. This Court is therefore unable to exercise its statutory jurisdiction and hereby dismisses this action.

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